FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

DECEMBER 1981
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DECISIONS

Commission Decisions

December 1981

Commission Decisions

Administrative Law Judge Decisions

DECEMBER

The following cases were Directed for Review during the month of December:

William Haro v. Magma Copper Company, WEST 79-49-DM, 80-116-DM. (Judge Morris, October 23, 1981)

Richard Clemons v. Anaconda Copper Company, WEST 81-298-DM. (Judge Broderick, Dismissal of October 28, 1981)

Secretary of Labor, MSHA v. Central Ohio Coal Company, LAKE 81-78. (Judge Cook, Settlement Approval of November 13, 1981)

Secretary of Labor, MSHA v. Inverness Mining Company, LAKE 81-45. (Judge Kennedy, November 4, 1981)

Secretary of Labor, MSHA v. Sewell Coal Company, WEVA 79-31. (Judge Kennedy, November 4, 1981)

Rosalie Edwards v. Aaron Mining, Inc., WEST 80-441-DM. (Judge Morris, November 17, 1981)

Secretary of Labor, MSHA, on behalf of Gordon Bennett, et al v. Emery Mining Company, WEST 80-489-D(A). (Judge Morris, November 24, 1981)

Secretary of Labor, MSHA v. Kocher Coal Company, PENN 80-174-R, 80-197. (Judge Laurenson, Petition for Interlocutory Review of December 14, 1981 order)

Review was Denied in the following case during the month of December:

Juan Munoz v. Summit Minerals Company, CENT 80-331-DM. (Judge Boltz, October 23, 1981)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 2, 1981

JOSEPH A. CAMPBELL, Complainant	:	
v.	:	Docket No. WEST 80-221-DM
THE ANACONDA COMPANY, Respondent	:	

ORDER

On November 23, 1981 Anaconda filed a petition for review raising questions of law and fact relating to the judge's decision issued on October 23, 1981. That decision includes a finding that Complainant Campbell was discharged on October 26, 1979 in violation of the discrimination provisions of § 105(c) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (Supp. III, 1979). Back pay and attorney's fees for the Complainant also are awarded, but the judge requests that counsel for both parties advise him in writing by November 16, 1981 whether they have agreed on the amounts due under those awards and if so, to submit those amounts to him for approval. The decision provides that if approval is given, an order will be issued which finally disposes of the proceedings; if counsel are unable to agree, further posthearing orders will be issued.

The October 23 decision does not resolve the monetary amounts. Consequently, it is not a final disposition and does not initiate the statutory review period under § 113 of the Mine Act, 30 U.S.C. § 823. Accordingly, Anaconda's petition for review filed on November 23, 1981 is dismissed as premature. Victor McCoy v. Crescent Coal Company, 3 FMSHRC ____ (November 5, 1981). The parties may file appropriate petitions for discretionary review in accordance with § 113 of the Mine Act and Commission Rule 70, 29 C.F.R. § 2700.70, after the judge enters his final disposition of this proceeding.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

81-12-5

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 3, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. HOPE 76-210-P
	:	HOPE 76-211-P
v.	:	HOPE 76-212-P
	:	HOPE 76-213-P
COWIN AND COMPANY, INC.	:	

ORDER

The Secretary has filed a petition for reconsideration of a Commission decision issued November 6, 1981. He requests clarification of that decision through an express statement that only two petitions for assessment of penalties were dismissed.

The Commission's order granting review limited the issue to whether 30 CFR §77.1903(b) is a mandatory safety standard. We held that it is not. The only petitions and penalties that were before the Commission, and hence were dismissed, involved section 77.1903(b). In context, we believe it is clear that the Commission did not review and the decision did not affect violations of other standards at issue before the judge.

Accordingly, the petition for reconsideration is denied.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 4, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of Johnny Chacon v. PHELPS DODGE CORPORATION	:	Docket No. WEST 79-349-DM

ORDER

The Secretary has petitioned for reconsideration of our decision issued November 23, 1981. The Secretary argues that the decision was based largely on our resolution of factual issues not properly before us. The Secretary relies on our direction for review, which stated in part, "The issues on review are limited to those raised in section IV(E) of [Phelps Dodge's] petition [for discretionary review]." That section of Phelps Dodge's lengthy petition raised issues concerning the judge's application of the burdens of proof in this case. The issue reviewed was a broad one requiring discussion of both legal and factual questions. In declining to review a section of the petition challenging ten specific factual findings, we did not don a straightjacket. Rather, we selected a statement of the issue designed to focus the parties' attention on whether the appropriate analytical and evidentiary tests for a discrimination case had been properly applied. The fact that Phelps Dodge raised a question regarding a particular finding of the judge in one subsection of its petition did not preclude evaluation of that finding as an integral part of the section directed for review. Neither §113 of the Mine Act, 30 U.S.C. §823 (Supp. III), nor the Commission's rules require or encourage rigid rules of pleading.

To determine whether the judge properly applied the various burdens of proof in this case, it was necessary to examine the evidentiary factors he considered in arriving at his conclusions. Indeed, the Secretary himself discussed facts in his brief to the Commission. Discrimination cases involve many mixed factual and legal questions. We could not determine whether the Secretary "had sustained [his] burden of proof and/or burden of establishing a prima facie case" -- the essential question directed for review -- without examining the evidence pertaining to the prima facie case and the operator's defense against that case.

Accordingly, the petition for reconsideration is denied.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 18, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 81-6-R
PENN ALLEGH COAL COMPANY	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The proceeding involves the validity of a section 104(b) withdrawal order and the underlying citation issued to Penn Allegh Coal Company for an alleged failure to comply with a provision in its dust-control plan. For the reasons discussed below, we affirm the judge's decision. 1/

The citation alleges a violation of 30 CFR §75.316, which implements section 303(o), 30 U.S.C. §813(o), of the Act. Section 75.316 states in part:

> A ... dust-control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form.... Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

(Emphasis added.)

1/ Chairman Collyer assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Chairman Collyer's assumption of office, and participation by Chairman Collyer would therefore not affect the outcome. In the interest of efficient decision-making, Chairman Collyer elects not to participate in this case.

Former Commissioner Nease participated in considering this case and voted to affirm the judge's decision, but resigned from the Commission before the decision was ready for signature.

The dust control plan at issue required Penn Allegh to maintain a minimum water pressure of 150 psi (pounds per square inch) in all continuous mining machines. This provision of the plan dated January 12, 1977, was in effect since some time prior to March 1978. The purpose of this requirement is to insure that an adequate amount of water is dispensed from the machines' sprays thereby diminishing respirable dust. The plan, however, was unclear in two respects: it did not specify the location at which the water pressure was to be measured, and did not indicate whether the reading was to be taken while the machine was operating ("flow condition") or while the machine was turned off ("static condition").

Despite these ambiguities, no controversy apparently arose until April 1980, when an inspector issued two citations for alleged failure to meet the 150 psi requirement. 2/ The inspector measured the pressure near the shutoff valve under flow conditions. Penn Allegh abated the citation under protest claiming the plan called for, and previous measurements had been taken under, static conditions. 3/ In light of the April citations, Penn Allegh sought to amend the plan to require 70 psi-flow. MSHA indicated it would tentatively approve the modification while it conducted a brief dust survey; it would grant final approval only if the survey showed that respirable dust remained at an acceptable level. However, Penn Allegh declined to submit to the survey claiming, among other things, that it was not "technically and scientifically sound." As a result, MSHA notified Penn Allegh that a 150 psi-flow requirement would remain in effect.

In late July 1980, Penn Allegh submitted its scheduled 6-month dust plan review. It changed the 150 psi requirement of the plan to require either 150 psi-static or 70 psi-flow. An MSHA District 2 mining engineer John Karp, approved the revision on September 22, 1980. This official had seen MSHA's letter offering to conduct a survey and had mistakenly assumed that the survey had been conducted and the change made in accordance with the survey results.

MSHA first noticed its mistaken approval in October 1980, when an inspector preparing for a dust-compliance inspection discovered the change. On Thursday, October 2, 1980, MSHA officials informed Penn Allegh by telephone and a follow-up letter mailed the same day that 150 psi-flow would be the enforced provision. On the following Monday morning, an inspector issued the citation at issue in the present case after he measured a water pressure of 80 psi-flow near the shut-off valve. He returned the next morning to see if the condition had been abated. He measured the machine's water pressure at 110 psi-flow. When

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2/ These April citations are pending in a different proceeding before an administrative law judge. Docket Nos. PENN 80-208-R and 80-209-R. We note that Penn Allegh abated and did not contest a previous citation issued on January 29, 1980, alleging a violation of the 150 psi water pressure requirement. However, this citation did not specify whether the pressure was measured under flow or static conditions and therefore it does not help resolve the ambiguity.

3/ Both parties agreed that regardless of the measurement method, the water pressure was to be measured at a location near the machines' shutoff valves.

Penn Allegh informed him that no action would be taken to bring the machine into compliance with MSHA's interpretation of the plan (150 psi-flow) he issued the §104(b) withdrawal order which is also contested on review.

The judge affirmed the citation and withdrawal order. 4/ He construed the plan's "150 psi" term to mean 150 psi measured under flow conditions. Turning to the revision, the judge found that MSHA made a good faith mistake in its approval. He found that MSHA validly repudiated its approval of the revision and concluded that the original plan's 150 psi-flow provision was the enforceable water pressure. Accordingly, the judge upheld the citation and withdrawal order.

We first address the meaning of "150 psi" as the term is used in the plan. The 150 psi water pressure provision is listed on page 6(a) of the dust plan. Originally the page was one of several standard form sheets provided by MSHA for use in submitting a plan. The latent ambiguity occurs because the column headed PSI, under which the 150 requirement is listed, does not specify whether the measure is to be taken under static or flow conditions. The parties' arguments are largely conflicting assertions. Penn Allegh asserts the 150 psi requirement was to be measured under static conditions. Conversely, MSHA contends the water pressure was to be measured under flow conditions.

The strongest evidence indicating that measurement under flow conditions was required is MSHA's District 2 policy of measuring all continuous miner water pressures under flow conditions. MSHA's coal mine technical health specialist, Robert Davis, who reviewed all dust-control plans in District 2, testified that he had always instructed inspectors to measure water pressure under flow conditions. He stated he knew of no District 2 dust-plans that called for measurement under static conditions. He concluded that MSHA had adopted the policy because a static measure failed to accurately indicate the water volume at the sprays to suppress dust. His testimony was corroborated by three other MSHA witnesses.

Balanced against this evidence of District 2's practice of measuring under flow conditions is the testimony of Penn Allegh's chief engineer, Alfred Reisz. He stated that when he drafted and submitted Plan A, using the form sheets which MESA (MSHA's predecessor) provided, he contemplated a static measure taken at a location near the shut-off valve. He assumed that since the form did not have a space for the location or condition of measure he did not need to specify them. 5/

4/ The judge's decision is reported at 2 FMSHRC 3072 (1980).

5/ Additionally, Penn Allegh produced evidence indicating that because District 2 measured the water pressure at the shut-off valve, a flow measure was not a better indicator of the water available at the sprays for dust suppression. After the water enters the continuous miner, it continues through the machine performing a cooling function. It passes through two devices, a pressure regulator and a booster pump. These devices coupled with the circuitous path it takes, change the water pressure so that the entering pressure does not bear any relation to the existing pressure at the sprays. Penn Allegh's explanation of the inner workings of the machine supports a conclusion that a flow measure taken at the shut-off valve might not be more logical than a static measure taken at the same location. However, the relative merits of the locations at which pressure could be measured is not before us.

The statute and the standard require the parties to agree on a dust control plan in the interest of miner safety. Therefore, after a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed-upon meaning. See Ideal Mutual Ins. Co. v. CDI Construction Inc., 640 F.2d 654, 658 n.7 (5th Cir. 1981). We find the record contains substantial evidence to support the judge's finding that the plan encompassed a flow measure. We believe that the evidence of consistent enforcement supports the conclusion that a flow measure was intended in Penn Allegh's dust plan. We note that in light of the very purpose of the provision, i. e., suppression of dust during the operation of continuous miners, measurement under flow conditions, rather than measurement with the shut-off valve closed, seems eminently appropriate (but see n. 4). We further hold that to the extent the judge's conclusion reflects a credibility determination, i.e., accepting the testimony of MSHA's witnesses as to the meaning of the term, rather than Penn Allegh's, that credibility determination should be given deference.

With the proper interpretation of the plan established, we address the effects of the revision. We believe the fact that the citation and withdrawal order were issued against the backdrop of an ongoing dispute is important. Penn Allegh had sought to amend its plan before it submitted its plan for the 6-month review under section 75.316. However, this early modification attempt failed when Penn Allegh declined to permit a dust survey that MSHA indicated was a prerequisite to lowering the required water pressure. MSHA official Robert Davis, both by letter and in conversation with Penn Allegh's chief engineer, made it clear that it was not MSHA's policy to modify a plan provision without first conducting a survey. Nevertheless, Penn Allegh submitted its six month review plan without submitting to the survey and without calling attention to the change made in the existing plan. In this regard, we believe that Penn Allegh could have been more open in its discussions with MSHA concerning the plan at this point.

In contrast, the judge found that MSHA made a good faith mistake. The MSHA mining engineer who approved the revision freely admitted his error. He stated that in his review, he interpreted MSHA's letter offering tentative approval of 70 psi-flow reduction as conditioned on the results of a dust survey. He was unaware of and not involved in the ongoing water pressure dispute. He assumed the survey had been successfully concluded and therefore that the reduction was permissible. He admitted that if he had examined Penn Allegh's file more carefully he would have noted that the survey had not been conducted and, in accordance with MSHA's survey policy, would have disapproved the change. In the light of the circumstances, we affirm the judge's findings that the mistake was made in good faith, and that MSHA could repudiate the 70-psi revision. 6/

6/ We note that the present situation, where a revision of a plan is approved by mistake, is an infrequent occurrence. It is to be distinguished from the situation where during a review, MSHA decides that a dust plan provision must be revised. In the latter situation, MSHA would have to notify Penn Allegh of its view that a revision is necessary, provide a reasonable time for adopting and filing a revised plan, and, if a satisfactory solution is not reached, citations would be issued. See discussion infra.

The final question concerns the ramifications of the Secretary's revocation. After rescinding its mistaken approval of the revision, MSHA unilaterally informed Penn Allegh that the former 150 psi-flow requirement was to be followed. The heart of Penn Allegh's argument is that MSHA thereby attempted to enforce a provision that Penn Allegh had not adopted. This, Penn Allegh asserts, violates section 75.316's adoption/approval scheme as interpreted in Bishop Coal Co., 5 IBMA 231 (1975), and Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir., 1976).

In Bishop, MESA attempted to impose a requirement for rib supports in an operator's roof control plan. 7/ The operator's previous plan contained no rib support provision. It was added to the plan by a MESA official who, after preliminary discussions, obtained the operator's signature on a blank page of the plan and later added the rib support requirement ex parte. In reviewing withdrawal orders issued by MESA, the Board expounded on the adoption/approval process, stating first:

> [MESA] is required, in our view, to notify the operator in writing of a disapproval of, or the need for changes in, a roof control plan proposal adopted and filed by such operator for approval, and must include in such notice a concise, general statement of the reasons for such action.

(Emphasis in the original) 5 IBMA at 243. The Board continued to discuss the parties' responsibilities:

> [I]f a[n operator's] proposal has a legitimate objective, but is in need of change, the District Manager under the subject regulation, must specify in writing the nature of the changes and afford the opportunity to discuss and negotiate over such changes. It is of course implicit that the District Manager also specify a reasonable time within which to adopt and file an amended proposal for approval ... In notifying an operator in writing of the deficiencies of its proposal and suggested changes, a District Manager must be sufficiently specific to adequately apprise an operator of what they are. When outlining changes, a District Manager does have the leeway to suggest draft language or deletions from the proposal at hand, but he cannot impose them by fiat upon an operator who refuses to "adopt" such changes. It is after all the operator who must determine whether to adopt suggested or negotiated changes or to litigate in the face of enforcement actions by MESA which are bound to follow an impasse with the District Manager.

(Footnotes omitted; emphasis added) 5 IBMA at 244.

In Zeigler Coal Co. v. Kleppe, the operator contested MESA's issuance of a withdrawal order on the basis that the ventilation plan requirements that MESA sought to enforce were not enforceable mandatory standards even though the operator had adopted the questioned provision. The operator contended that, if the plan's requirements were deemed to be enforceable mandatory standards, arbitrary enforcement would result

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7/ Although Bishop dealt with roof control plans under the 1969 Coal Act, a similar "approval by the Secretary" and "adoption by the operator" process was mandated.

because the plan was not subject to the consultative procedures in either section 101 of the Mine Act or section 553 of the Administrative Procedure Act. The D.C. Circuit rejected the operator's argument and held that the plan's requirements were enforceable as if they were mandatory standards. The Court adopted the Board's rationale in Bishop and found the operator was adequately protected from the imposition of requirements unilaterally created by the Secretary because a plan had to be adopted by the operator. The Court stated:

> The statute makes clear that the ventilation plan is not formulated by the Secretary, but is "adopted by the operator." While the plan must also be approved by the Secretary's representative, who may on that account have some significant leverage in determining its contents, it does not follow that he has anything close to unrestrained power to impose terms. For even where the agency representative is adamant in his insistence that certain conditions be included, the operator retains the option to refuse to adopt the plan in the form required....
>
> The agency's recourse to such a refusal to adopt a particular plan appears to be invocation of the civil and criminal penalties of §109, which require an opportunity for public hearing and, ultimately, appeal to the courts. At such a hearing, the operator may offer argument as to why certain terms sought to be included are not proper subjects for coverage in the plan. Because we believe that the statute offers sound basis for narrowly circumscribing the subject matter of ventilation plans, we conclude that this opportunity for review is a substantial safeguard against significant circumvention of the §101 procedures.

(Footnotes omitted; emphasis added) 536 F.2d at 406-407.

Penn Allegh asserts that MSHA's return to the original plan's requirement breached two duties imposed by the Bishop rationale. First, MSHA failed to negotiate and discuss the reimposition of the original plan with Penn Allegh. The Secretary merely informed Penn Allegh that 150 psi-flow would be the enforced provision. Second, MSHA failed to give Penn Allegh a reasonable time within which it could adopt and file an amended plan. MSHA issued the citation on the second working day after the inspector's telephone call. MSHA counters that Penn Allegh misperceives the negotiation process. The Secretary argues that after MSHA rescinded the revision that had been inadvertently approved, "[t]he duty to initiate straightforward, above-board renegotiation belong[ed] to the party seeking the revision." MSHA argues that Penn Allegh precluded the possibility of negotiation because of its absolute and unreasonable refusal to submit to the dust survey or to offer other adequate assurance that the dust level would remain acceptable.

The important role that ventilation and dust control plans play in the overall statutory scheme cannot be overstated. Congressional recognition of the urgent need for adequate ventilation and dust control in the nation's coal mines is clearly reflected in the legislative

history, as well as in section 303(o)'s requirement that such plans were to be adopted in the first ninety days following the passage of the 1969 Coal Act. See also Zeigler Coal Co., supra, 536 F.2d at 408-409. Under section 303(o) and 30 CFR §75.316, after initial implementation the plans can be reviewed and revised. We hold that ventilation and dust control plans are continuous in nature; a plan does not expire at the end of a six month period simply because the parties have failed to finally resolve a suggested revision. In the present case, in light of our previous conclusion that the Secretary validly rescinded the mistaken approval of Penn Allegh's revision to the original plan, we conclude that the original plan remained in effect. This leaves the parties with the ability, in fact the duty, to negotiate in good faith over a resolution of the "flow-static" measurement controversy. At the same time it affords miners the protections of the plan previously adopted by Penn Allegh and approved by the Secretary. 8/

The only remaining issue is the timing of MSHA's issuance of the involved citation and order. On Thursday, October 2, 1980, MSHA informed Penn Allegh by telephone and by a letter that 150 psi-flow would be the enforced water pressure rather than Penn Allegh's 70 psi provision. On Monday, October 6th, the citation was issued after the inspector obtained a reading of 80 psi-flow. On the following day a reading of 110 psi-flow was obtained and the 104(b) order was issued. Although the citation and orders were issued very soon after MSHA discovered its error and informed Penn Allegh that it no longer deemed the revision to be in effect, we believe that any questions as to notice and fairness to Penn Allegh are allayed by Penn Allegh's insistence that it would comply with the revision, or no plan at all. Thus, the timing of the issuance of the citation and order is of little significance.

In sum, we conclude that substantial evidence supports the judge's conclusion that the dust control plan required a water pressure of 150 psi measured under flow conditions; MSHA validly rescinded its mistaken approval of Penn Allegh's revision of this requirement; and the 150 psi provision validly was enforced against Penn Allegh. For these reasons, we affirm the judge's decision.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

8/ The requirement of good faith negotiations by both parties eliminates any fear that an operator must forever labor under a provision that has been adopted and approved. If an operator believes a revision is warranted, has engaged in a reasonable period of good faith negotiation, and believes the Secretary has acted in bad faith in refusing to approve the revision, he can obtain review of the Secretary's action by refusing to comply with the disputed provision, thus triggering litigation before the Commission. The present case does not present this situation due to the apparent lack of good faith negotiation by Penn Allegh over the desired revision.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 22, 1981

CONSOLIDATION COAL COMPANY	:	Docket Nos. WEVA 80-116-R
	:	WEVA 80-117-R
v.	:	WEVA 80-118-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

This case is remanded to the administrative law judge for further proceedings consistent with the court's opinion in Consolidation Coal Company v. Secretary of Labor, No. 80-1862, 4th Cir., October 13, 1981.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 22, 1981

SECRETARY OF LABOR,	:	Docket Nos. WEVA 79-447-R
MINE SAFETY AND HEALTH	:	WEVA 79-448-R
ADMINISTRATION (MSHA)	:	WEVA 79-449-R
	:	WEVA 79-450-R
v.	:	WEVA 79-451-R
	:	WEVA 79-452-R
MABEN ENERGY CORPORATION	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). It involves citations issued for conditions relating to the same dam and retention pond that was the subject of the recent Commission decision in Maben Energy Corp., 3 FMSHRC 2280 (1981) (" Maben I"). In that case we decided Maben operated or controlled the dam and pond for purposes of the regulation in issue and the citation was affirmed. 1/

The instant citations remained pending before the administrative law judge during the resolution of Maben I. 2/ Early in this proceeding, a letter was sent by counsel for Maben to the judge in which it was agreed that Maben would be bound by the final Commission decision in Maben I unless "the Commission's decision is adverse to [Maben's] interest ... and in such event [Maben] would be bound by the ultimate outcome of a final decision of the highest court hearing the same, not by the Commission's decision." In addition, a formal stipulation was filed on October 6, 1980, setting forth the agreement of the parties that the facts in the instant case are "identical" to those in Maben I, but with no reference to the outcome of Maben I. Those two documents comprise the entire evidentiary record before us.

1/ The regulation cited in Maben I was 30 CFR §77.216-3(a) which requires inspection of impoundments by persons owning, operating or controlling the structure.

2/ The citations at issue in the instant case, which were written about five months after the citation in Maben I, involve alleged violations of 30 CFR §§77.216-1 and 77.216(c) for failure to name an individual responsible for the impoundment and to develop a use plan for it.

The judge issued his decision in this proceeding shortly after we issued our opinion in Maben I. He cited our decision in Maben I and stated that the parties had agreed to be "governed" by it. Accordingly, he affirmed the instant citations and dismissed the notices of contest on the basis of that "agreement."

Maben petitioned for review of the judge's decision and we granted that petition on November 24, 1981. The petition argued that the judge's decision was "premature" and that Maben had not agreed to be bound by the Commission decision in Maben I until the question was resolved by the highest court to hear any appeal. 3/ Maben also raised questions as to the propriety of findings in Maben I as incorporated in the judge's decision in this case.

We do not agree with the operator that the judge's decision in this case is "premature." A decision issued by this Commission is binding on the parties unless and until stayed or overturned by a reviewing court of appeals. 30 U.S.C. §816(c). The parties may not stipulate to the contrary and Maben may not otherwise be relieved from the legal effect of that decision.

It appears, however, that the operator is correct that the parties did not, as the judge held, stipulate that they would necessarily be bound by the Commission decision in Maben I. Our reading of the August 1979 letter, which is the only "stipulation" that refers to the outcome of Maben I, persuades us that the judge misinterpreted the operator's language. Accordingly, we hold that the judge was in error in basing his disposition of the case solely on the parties' "agreement" to be bound by Maben I and we do not adopt that portion of his opinion.

Nevertheless, we affirm the judge as to result. The parties agreed in the stipulation dated October 6, 1980, that the facts in this case are identical to those in Maben I. Only the question of the legal effect of the facts remains at issue here. We decided in Maben I that under these facts, Maben maintained the requisite control to find a violation of the Act. Accordingly, that point is resolved against Maben in the present case as well. 4/

3/ In fact, Maben I has been appealed to the Fourth Circuit where it is now pending. Maben Energy Corp. v. Secretary Of Labor and Federal Mine Safety and Health Review Commission, No. 81-2075. This Commission denied Maben's request for stay of Maben I pending the outcome of the appeal and on December 9, 1981, the Fourth Circuit also declined to issue a stay.

4/ There being no dispute as to operative facts, no evidentiary controversy exists which would require us to return this case to the presiding judge for resolution. Rather, economy and efficiency of adjudication dictate that the Commission itself apply the previously established law to the stipulated facts. We anticipate no prejudice to any party by our action. Cf. Knox County Stone Co., Inc., DENV 79-359-PM, November 6, 1981, slip. op. at 4 (approving disposition at review level in appropriate circumstances).

For the reasons set forth above, the citations are affirmed and the notices of contest are dismissed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 31, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. HOPE 76X409 IBMA 77-26
ROYALTY SMOKELESS COAL COMPANY	:	

ORDER

The Secretary of Labor's unopposed motion for voluntary dismissal is granted.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 1 1981

WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY, Contestant	:	Contest of Citation
	:	Docket No. LAKE 81-106-RM
v.	:	
	:	White Pine Mine
SECRETARY OF LABOR, Respondent	:	
	:	
UNITED STEELWORKERS OF AMERICA, Intervenor	:	
	:	
	:	
SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. LAKE 81-171-M
	:	A.C. No. 20-00371-05037
WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY, Respondent	:	White Pine Mine
	:	
UNITED STEELWORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, Ishpeming, Michigan, for White Pine Copper Division, Copper Range Co.;
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Secretary of Labor;
Harry Tuggle, Assistant Safety Director, United Steelworkers of America, Pittsburgh, Pennsylvania, for United Steelworkers of America.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced on March 12, 1981, when White Pine Copper Division, Copper Range Company (hereinafter "White Pine") filed a notice of contest under section 105(d) of the Federal Mine Safety and Health Act of

1977, 30 U.S.C. § 815(d) (hereinafter "the Act") to contest a citation issued by the Mine Safety and Health Administration (hereinafter "MSHA") for violation of a mandatory safety standard, 30 C.F.R. § 57-3.20. Thereafter, the United Steelworkers of America (hereinafter "USWA") intervened in this proceeding and the civil penalty proceeding arising out of this citation was consolidated with the contest action.

A hearing was held in Houghton, Michigan on June 2-3, 1981. MSHA's witnesses were Walter Leppanen and William Letzens. White Pine called the following witnesses: William Carlson, Glenn Scott, Albert Ozanich, David Charles, Albert Goodreau, Julio Thaler, Joseph Maher, and Jack Parker. The USWA called the following witnesses: Ed Hocking, Dale Sain, Frank Dove, Malcolm Penegor, Eugene DeHut, Gordon Seid, Joe Aknisko, and John Cestkowski. All three parties filed posthearing briefs.

A brief historical review is necessary to place the instant controversy in its proper perspective. White Pine management believed that no valid purpose was served by using roof bolts in certain parts of its mine. Accordingly, it decided to demonstrate that uniform installation of 4 foot roof bolts on 4 foot centers was not necessary and did not enhance safety. As White Pine's first initiative in this direction it removed roof bolts from an area in Unit 56 on February 5, 1980. Two weeks later, an MSHA inspector issued an imminent danger order pursuant to section 107(a) of the Act. The validity of this order was litigated before Judge Edwin S. Bernstein. On January 14, 1981, Judge Bernstein vacated the order and found that an imminent danger did not exist at the time the order was issued. White Pine Copper Division v. Secretary, 3 FMSHRC 211 (January 14, 1981). Neither MSHA nor the USWA petitioned for review of that decision. On February 27, 1981, White Pine began the next phase of its demonstration program by mining an area in Unit 56 without using roof bolts or other roof support. Thereupon, the instant citation was issued on March 3, 1981.

ISSUES

Whether White Pine violated the Act or regulations as charged by MSHA and, if so, the amount of a civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. § 57.3-20 states as follows:

> Mandatory. Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used.

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated as follows:

The White Pine Mine is an underground copper mine owned and operated by the Contestant. The mine has products which enter commerce and has operations and products which affect commerce. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977. The Administrative Law Judge has jurisdiction pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. Walter Leppanen is and was a duly authorized representative of the Secretary of Labor to represent him at all times relevant herein as a federal mine inspector.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. White Pine Mine is a large underground copper mine located at White Pine, Michigan.

2. Mining is done by the room and pillar method at depths ranging from 150 feet to 2,100 feet.

3. White Pine has used three different mining configurations: parting shale, full column, and upper shale.

4. Underground mining began at White Pine in the mid 1950's. At that time, the parting shale configuration was used but uniform roof bolting was not employed. Roof bolting was used in 60 to 70 percent of the area mined during the 1950's. All areas developed since the 1960's have used uniform roof bolts except for the area involved in the instant citation.

5. At various times in various areas, White Pine used the following types of roof bolts: 4 foot mechanical bolts on 4 foot centers; alternating 4 foot and 7 foot bolts; alternating 4 foot and 6 foot bolts; and finally, 4 foot resin roof bolts. Today, the entire mine, except for the area in controversy here, employs 4 foot resin bolts.

6. White Pine's ground control department monitors movement of the mine roof or back through use of extensometers, lights and gauges. This

equipment can measure convergence of as little as 1/1000 of an inch. Flashlights attached to some of this equipment will light up if the ground converges a tiny fraction of an inch. The purpose of these lights is to warn miners of roof movement which might indicate instability.

7. On February 12, 1981, White Pine Superintendent, Julio Thaler, notified MSHA that White Pine intended to mine a drift in Unit 56 without the use of uniform roof bolts.

8. On February 27, 1981, White Pine began to mine the demonstration drift.

9. Approximately three pulls 1/ of 10 feet each had been completed by March 3, 1981. No roof bolts or other ground control had been installed in this area.

10. On March 3, 1981, MSHA inspector Walter Leppanen was conducting a regular health and safety inspection of the White Pine Mine. Before going underground on that date, he was informed that mining was being performed in Unit 56 without roof bolts.

11. Inspector Leppanen traveled to the demonstration drift in Unit 56. He observed that the sandstone roof or back was unsupported for a distance of approximately 32 feet from the face to the last row of bolts. White Pine foreman Joseph Lobeck informed the inspector that White Pine did not intend to install any bolts in the area. The inspector heard a popping and snapping sound in the roof or back which indicated to him a movement caused by pressure. He also observed a slip running a distance of about 27 feet diagonally through the roof. He also heard loose material falling from the roof to the floor. He saw a 3 foot area from which brown granular material had fallen from the roof. He saw a discoloration or oily substance along the edge of the slip for the entire length. Later, he observed a foreman standing in the area in controversy scaling the loose back in the unbolted area.

12. On March 3, 1981, Inspector Leppanen issued Citation No. 294190 pursuant to section 104(a) of the Act alleging a violation of 30 C.F.R. § 57.3-20 as follows: "Roof support was not provided in N-94 & W-53 intersection in Unit 56. Prior operating experience of the mine indicates that roof support is required. Miners were/had been working under the unsupported roof."

13. The citation was terminated when White Pine abated the condition by permanently closing the area and posting it against entry.

1/ A pull is the unit or linear advance of each drilling and blasting cycle.

14. There had been approximately eight roof fall fatalities at this mine.

DISCUSSION

Contentions of the Parties

White Pine asserts the following: (1) The mine roof in the cited area does not require ground control; (2) White Pine's prior operating experience in parting shale establishes that uniform ground control is not required in the cited area; and (3) the issuance of the citation constituted a denial of due process of law. MSHA contends that the operating experience of the mine requires the use of ground support and the condition of the particular cited areas indicates a need for ground support. The USWA supports MSHA's position herein but goes on to assert the novel argument that "it is psychologically unhealthy to mine at White Pine without roof support even under the most ideal conditions." USWA Brief at 9.

The merits of this controversy will be discussed in detail infra. However, White Pine's "due process" and USWA's "psychologically unhealthy" arguments will be dealt with summarily. White Pine claims that the issuing inspector failed to consider data proffered by White Pine and that an MSHA supervisor failed to promptly respond to White Pine's request for advice concerning the demonstration project. It is not surprising that White Pine cites no authority in support of its claim since there is none. I find that the procedures followed by MSHA concerning the issuance of this citation afford White Pine the due process of law guaranteed by the Constitution.

The USWA argues that "it is psychologically unhealthy to mine at White Pine without roof support even under the most ideal conditions." Resolution of the issue of whether the mental health of miners, absent a contemporaneous threat to the physical health of miners, falls within the ambit of the Act must be postponed to another day. Suffice it to say at this time that the USWA failed to present any probative or credible evidence of probable impairment of the mental health of the miners due to the cited condition. Hence, this argument is without merit.

Condition of Roof or Ground in Cited Area

The citation was issued in the demonstration area where White Pine was attempting to establish that neither roof bolts nor ground support was needed. The citation does not allege any specific problem with the roof in the particular area cited. However, MSHA devoted much time at the hearing to establishing that roof bolts or ground support was needed in the particular area. It is undisputed that no roof bolts were used for a distance of approximately 32 feet in the drift in controversy.

While there is a dispute as to the condition of this particular roof, White Pine's safety engineer, Albert Goodreau, conceded the following: he heard cracking and popping in the roof; he observed loose on the floor

measuring up to 1 by 5 inches; and there was a 3 inch band of discoloration extending diagonally across the roof for a distance of 27 feet. MSHA Inspector Leppanen testified that in addition to the facts conceded by Mr. Goodreau, he observed a slip in the discolored area which was unstable. The inspector also observed loose falling from the roof. The miners' representative essentially confirmed the testimony of the inspector.

White Pine's witnesses testified that the condition of the roof in the cited area was good and that only a slight amount of scaling was necessary. MSHA witnesses testified that the combination of roof noise, falling loose, and a slip of considerable length in the roof mandated the use of ground control in the particular area. I find that the testimony of MSHA's witnesses was more credible and persuasive than the testimony of White Pine's witnesses. Hence, I accept MSHA's contention that ground support was required in this particular area.

While it might be possible to terminate the decision at this point, that would leave undecided the basic controversy surrounding the entire demonstration project and the substance of the citation, to wit: whether the operating experience of the mine indicates that ground support is required. Failure to address and resolve this issue would lead to further attempts to mine without ground support under different roof conditions. I believe that it is unfortunate that the provisions of 30 C.F.R. § 75.200 do not apply outside of coal mining. Under that regulation, a coal mine operator must adopt a roof control plan approved by MSHA. Such plans must be reviewed every 6 months. There is no comparable requirement in metal mines such as White Pine. Thus, there is no formal method by which an operator may obtain MSHA approval for a roof or ground control plan. This is the second time within a year that White Pine has litigated its asserted right to employ an alternative ground support plan. I believe that, without further ado, White Pine is entitled to an answer to the question of whether the operating experience of the mine indicates that ground support is required.

Condition of Roof or Ground of Entire Mine

White Pine posits its contention that uniform ground control is not needed upon the fact that during the 1950's "thousands of lineal feet of mine drift were mined without the use of any roof bolts whatsoever." White Pine Brief at 20. Moreover, much of the bolting which was done in those days was added "after many feet of mining and blasting had been accomplished under unsupported roof." Ibid. MSHA's objection, that such evidence was irrelevant to the instant proceeding because there was no federal law applicable to underground metal mines during the period of time when White Pine Mine was without ground support, was overruled. However, the weight to be given to such evidence remains to be decided.

For the past 20 years, White Pine has followed a uniform roof bolting plan throughout its mine. Previously, roof bolting was used in the majority of areas mined but not in all of them. Even with roof bolting, White Pine has a history of approximately eight fatalities due to roof falls. White Pine

presented evidence that the roof in Unit 56 consists of massive sandstone and that roof bolts do nothing to insure the stability of the roof. Joseph Maher, White Pine's Director of Mine Planning and Engineering, testified that the only function of roof bolts in this area was to suspend the immediate roof from the main roof. On the other hand, MSHA mining engineer, William Lutzens, testified that, in his opinion, roof control was required throughout the mine because of factors such as the location of the mine in horizontal bedding, the presence of square openings rather than arched openings, and the fact that sandstone rock is not the most competent rock.

The removal of roof bolts was the subject of a prior imminent danger order which was vacated after a hearing. MSHA's objection to the evidence concerning this demonstration project was overruled. The evidence on this matter is subject to different interpretations. White Pine claims that all of the loose which fell upon the bolt removal was anticipated. Moreover, White Pine asserts that no material fell above the roof bolt line. MSHA doubts that White Pine expected some of the roof falls and noted that loose of up to 2 feet in depth fell after bolt removal. Furthermore, MSHA asserts that the roof bolting had already accomplished its purpose by the time the bolts were removed and this demonstration area was not an active production section which was subject to blasting. I conclude that the roof bolt removal project and the results thereof are entitled to little weight because of the failure to connect those results with the instant controversy. In other words, White Pine failed to establish that the evidence gathered from the bolt removal project shows that mining without any roof support is as safe as mining under uniform roof bolts. Likewise, I find that the evidence concerning convergence data is also entitled to little weight in this proceeding because it is not connected to predicting when a roof fall will occur. In fact, Joseph Maher, White Pine's Director of Mine Planning and Engineering, conceded that even with all of the data and devices for measuring convergence, White Pine was unable to predict with any precision when a roof fall would occur. Thus, the methds of measuring convergence and the convergence data do not establish that roof support is unnecessary.

Returning to the issue of whether the operating experience of the mine indicates that roof or ground support is required, I am persuaded that the most relevant evidence on this subject is the uninterrupted 20 year history of uniform roof bolting. Although the regulation speaks only of the "operating history" as relevant to the issue of roof or ground control, I believe that even without any operating history, a new program would be acceptable if the operator proved that it was just as safe as the prior program. However, in the instant case, White Pine's evidence fails to meet that test. I have previously found that the roof in the cited area included a slip which was unstable and required bolting. The testimony of Jack Parker, a self-employed consultant from White Pine, Michigan, is not entitled to much weight in this proceeding because he appears to be an advocate of "no bolt" mining rather than an impartial expert. In fact, Mr. Parker was employed by White Pine from 1961 to 1971 and, during that period of employment, he recommended "no bolt" mining. I find the testimony of MSHA mining engineer William Lutzen to be more credible. Thus, I conclude that the pertinent operating

history of this mine requires the use of roof bolts in all areas of the mine. White Pine failed to establish that "no bolt" mining or "bolting as required" mining would be as safe as uniform bolting. The citation is affirmed and White Pine's contest is denied.

Civil Penalty

MSHA proposed a civil penalty of $500 for the violation in this case. Although White Pine failed in its contest of this citation, I find that it was acting in good faith and was not negligent in choosing to eliminate the need for ground support in this manner. However, the gravity of this violation was serious because miners were exposed to severe injury or death in the event of a roof fall. The preponderance of the evidence further establishes that without ground support in the affected area, a roof fall was likely.

Based upon all the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $250 should be imposed for the violation found to have occurred.

CONCLUSIONS OF LAW

1. The administrative law judge has jurisdiction over the parties and subject matter of this proceeding.

2. White Pine and its White Pine Mine are subject to the Act.

3. The operating experience of the White Pine Mine indicates that ground or roof support is required throughout the mine.

4. The condition of the unsupported ground or roof in the area cited herein indicated that the area required ground or roof support.

5. White Pine's evidence concerning certain areas of the mine which were mined in the 1950's without ground or roof support is entitled to little weight.

6. White Pine's evidence concerning the demonstration roof bolt removal project in Unit 56 is entitled to little weight.

7. Citation No. 294190 issued on March 3, 1981, charging a violation of mandatory safety standard 30 C.F.R. § 57.3-20 is affirmed.

8. Pursuant to section 110(i) of the Act, a civil penalty in the amount of $250 is assessed against White Pine.

ORDER

WHEREFORE IT IS ORDERED that White Pine's contest of Citation No. 294190 is DENIED and Citation No. 294190 is APPROVED.

IT IS FURTHER ORDERED that White Pine pay the sum of $250 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 57.3-20.

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 7 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PITT 78-97-P
	:	Allegheny No. 2 Mine
v.	:	
PENN ALLEGH COAL CO., INC., Respondent	:	

DECISION AND ORDER

After remand, this matter is before me on the parties' motion to approve settlement of this much protracted litigation at a reduction in the penalty from $106 to $25.00.

While it appears that the Commission was without authority or jurisdiction to consider the issue it found dispositive, namely the claimed unavailability of the "diminution of safety" defense in an enforcement proceeding, there is no necessity to pursue the consequences of that further in this proceeding. 1/

Accordingly, it is ORDERED that for good cause shown the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $25.00, on or before Monday, December 28, 1981.

Joseph B. Kennedy
Administrative Law Judge

1/ Under the Mine Safety Law the Commission does not have de novo review powers. Section 113(d)(2)(iii)(A) and (B) of the Act precludes review of any issue not raised before the administrative law judge or covered by the Order Directing Review. In this case the record shows and the Commission's decision admits that the issue concerning the "diminution of safety" defense was raised by the Commission sua sponte and that neither the trial judge nor the parties were afforded an opportunity to pass on the matter. Compare, Brown & Root, Inc. v. Marshall, ___ F.2d ___, 1981 OSHD Par. 25,741, p. 32110 (5th Cir. 1981); McGowan v. Marshall 604 F.2d 885, 889 (5th Cir. 1979).

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DEC 7 1981

LOCAL UNION 2250, DISTRICT 12, UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	Complaint for Compensation
	:	Docket No. LAKE 82-1-C
	:	Mine No. 25
v.	:	
OLD BEN COAL COMPANY, Respondent	:	

DECISION

This matter came on for oral argument on the parties' cross motions for summary disposition on December 2, 1981, in Falls Church, Virginia. Based on an independent evaluation and de novo review of the circumstances I find there is no need for an evidentiary hearing; that there is no genuine issue as to any material fact; and that as a matter of law the Union is entitled to recover on behalf of the seventy-four claimant miners short-term compensation claimed under section 111 of the Act, 30 U.S.C. § 821.

The facts which give rise to this claim are undisputed. On Saturday, August 1, 1981, at approximately 7:30 a.m. a fire occurred in the "A" shaft at the No. 25 mine. The miners were immediately withdrawn from the mine, and management began efforts to extinguish the fire. When the Federal inspector, Jessie Melvin, arrived at the mine sometime after 8:15 a.m., he issued a 103(k) withdrawal Order No. 1117966 requiring that only persons necessary to investigate the fire scene and conduct an air examination of the immediate vacinity should enter the mine. At 12:45 p.m. the order was modified to allow rehabilitation of the accident area and to resume normal operations at the mine. The afternoon shift (4 p.m. - 12 a.m.) worked their full shift that day. The morning shift was paid four hours reporting pay pursuant to the UMWA contract.

The union claims that under Section 111 of the Act the miners are entitled to compensation for an additional four hours pay for the balance of the shift. 1/ The operator has raised as a defense the

1/ Sec. 111 reads in part, "If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift . . ." This order was issued under Section 103(k) of the Act.

claim that where the miners were immediately withdrawn from the mine before the 103(k) order was written it is not in accord with the policy of the Act to award compensation. 2/

In the legislative history accompanying section 111 Congress made clear that ". . . miners should not lose pay because of the operator's violation, or because of an imminent danger which was totally outside their control." (Emphasis added). S. Rep. No. 95-181, 95th Cong. 1st Sess. 46-47 (1977), in Legislative History of the Federal Mine Safety and Health Act of 1977, at 634-635. This case presents a situation in which an order was written to facilitate an investigation of an imminent danger outside the miners control. The prior Interior Board of Mine Operations Appeals, the Commission and its judges have consistently awarded compensation in cases where the miners had been withdrawn prior to the issuance of an order. Peabody Coal Co. v. Mine Workers, 1 FMSHRC 1785 (November 14, 1979); UMWA v. Consolidation Coal Co., 1 MSHC 1668 (1978); UMWA v. Consolidation Coal Co., 1 MSHC 1674 (1978); UMWA v. Clinchfield Coal Co., 1 IBMA 33 (May 4, 1971); Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1 (January 28, 1976).

Unlike UMWA v. Eastern Associated Coal Corp., 3 FMSHRC 1175 (May 11, 1981), where the miners had withdrawn prior to the issuance of an order in observation of a contractual memorial period, the miners here were idled by the same condition which led to the issuance of the order, i.e., the mine fire in shaft A on August 1, 1981. There was, therefore, a clear "nexus between the underlying reasons for the idlement and pay loss and the reasons for the order". Id. at 1178. I conclude that the existence of the "exigent or emergency conditions" created by the mine fire was the proximate and effective occasion for issuance of the closure order. Id. at 1178.

While the order was modified to permit operations to clear the mine of smoke and to conduct the necessary preshift operations at 12:45, the record shows these actions were not accomplished until just after 4:00 p.m. The period of idlement that was occasioned by the condition that caused the order to issue was not terminated until that time. For this reason, the miners are entitled to be compensated for an additional four hours, the balance of their shift.

2/ At oral argument, counsel for the operator suggested voluntary withdrawal of the miners on the midnight shift be treated as the effective time of idlement for the purposes of statutory entitlement and that the four hours reporting pay for which the next shift was paid be considered as payment for the four hours to which the "next working shift" would be entitled under the second sentence of section 111. This afterthought contention is obviously without merit under the uncontested facts of this case, and would not affect the right of recovery of the morning shift for four hours compensation in any event. See, Local 1374, UMWA v. Beatrice Pocahontas Co., 3 FMSHRC 2004 (August 27, 1981); Local 5869, UMWA v. Youngstown Mines Corp., 1 FMSHRC 990 (August 15, 1979).

It is in accord with the "make whole" policy of the Act to award interest on the sums due the miners from the date of the idlement until the date of payment. UMWA v. Youngstown Mines Corp., 1 FMSHRC 990 (August 14, 1979); UMWA v. Kanawha Coal Co., 1 FMSHRC 1299 (September 4, 1979); Peabody Coal v. UMWA, 1 FMSHRC 1785 (November 1979). I find, therefore, that the requested rate of interest, 12%, is reasonable. UMWA v. Beatrice Pocahontas Co., 3 FMSHRC 2004, 2013 (August 27, 1981); Johnny Howard v. Martin-Marietta Corp., 3 FMSHRC 1876 (July 31, 1981).

The Union's request for an award of attorney fees is without merit. The statute, of course, does not provide for an award of attorney fees in compensation cases. UMW v. Tansy Beth Mining Company, 3 FMSHRC 466, 471 (February 19, 1981); UMW v. Royal Coal Company, 3 FMSHRC 1738, 1747-48 (July 7, 1981). The Union seeks to bring itself within the exception to the American Rule. That exception permits an award of attorney fees in the absence of statutory authority where a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Roadway Express v. Piper, 447 U.S. 752 (1980).

While the operator's denial of total liability in this matter may be viewed as unwarranted, if not frivolous, in view of the extensive case law, it must be remembered that it was not until November 18, 1981, that the Union filed an Amended Complaint deleting its claim for compensation for the evening shift which might also be viewed as vexatious. Furthermore, the Union had the burden of proof and, as the record shows, it was, with an assist from the trial judge, able to discover the facts necessary to sustain that burden with a minimum of time, trouble, and expense. The operator's resistance to the Union's interrogatories while obviously very annoying to Union counsel was justified to the extent the interrogatories covered a subject matter later found to be without the scope of the Union's claim. The record discloses nothing more than that the operator, while somewhat intransigent in the face of the Union's interrogatories, furnished the information necessary to resolve the factual issues promptly and in good faith in response to the trial judge's pretrial order. This disclosure mooted the Union's motion to compel answers and enabled the Union to file its cross motion for summary judgment.

While the hostility between counsel that emanates from the record is regrettable, it seems a necessary byproduct of the industry's generally poor labor relations. 3/ In any event, the law does not recognize the ordinary and necessary costs of litigation, however unwarranted and vexatious they may appear to the parties, as grounds for an award of costs or attorney fees. As Justice Powell noted in Roadway Express:

3/ One would hope that professionals would eschew use of some of the pettifogging tactics observed, such as respondent's denial of receipt of the order at issue because counsel for the Union had inadvertently misstated the proper number.

> Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. Cf. Dickens, Bleak House 205 (1948). A number of factors legitimately may lengthen a lawsuit, and the parties themselves may cause some of the delays. Nevertheless, many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for discovery . . . The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law. 447 U.S. at 757, n. 4.

The same problems plague the administrative process, as I have so often pointed out. The problem is what sanctions may be imposed on lawyers who abuse the administrative process and unreasonably protract administrative proceedings. In Roadway Express, the Supreme Court held that under Rule 37(b) of the F.R.C.P., which, I believe, apply to Commission proceedings, "both parties and counsel may be held personally liable for expenses 'including attorney's fees,' caused by the failure to comply with discovery orders." 447 U.S. at 763. The Court also held that the courts, and presumably administrative adjudicative agencies, have, after notice and an opportunity for hearing, inherent power to levy sanctions against litigants and counsel who "willfully abuse judicial processes." 447 U.S. 766.

The record here fails to show that either party was put to any added expense to prove facts that the other should have admitted or that there was any willful abuse of the administrative process. Only the usual "sloth, inattention and desire to seize tactical advantage" that characterizes our vaunted adversary system.

Accordingly, complainant's Motion for Summary Decision is GRANTED. It is ORDERED that the operator forthwith pay the sums agreed upon to the individuals listed in the Appendix attached hereto plus 12% interest from August 1, 1981 to the date of payment, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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APPENDIX A

NAME	AMOUNT PAID
Larry J. Barton	$ 70.59
Larry Wharton	70.59
James D. Moore	70.59
Dwight Spiller	70.59
James D. Cook	70.59
Frank W. Maynor	70.59
Carl Brannan	70.59
Franklin Abbott	70.59
Ronald D. Cullum	70.59
David B. Cullum	70.59
Vincent Baker	70.59
Gary A. Hill	70.59
Bob J. Johnson	70.59
Jerry C. Pigg	70.59
Maurice Hill	70.59
Ken W. Cochrum	70.59
Duglas R. Hitt	70.59
Kenneth L. Hargis	70.59
Frank Varis	64.62
Marvin Eberhart	64.19
Randall Roberts	68.16
Phil Grosshenrich	68.16
Donald W. Snyder	68.16
Donald Herring	68.16
Richard Knapp	68.16
Charles Laurenti	68.16
Lawrence Bragg	68.16
Jeff S. Davidson	68.16
Randy Spreitler	68.16
James R. Allen	70.59
Ralph L. House	70.59
Stephen Reese	70.59
Ron Tate	70.59
Joseph Ruzich	68.16
C. Dean Haseker	70.59
Kevin Rudolph	70.59
Bill E. Mueller	68.16
Michael Merrett	70.59
Robert Smith	70.59
Roger Melvin	70.59
Mike Durkota	70.59
Gary Beavers	70.59
Gary D. Mueller	70.59
Ronald Niblett	65.96
George Willard	68.16
Steven L. Tolbert	68.16
Gary W. Kelton	68.16

APPENDIX A (cont.)

NAME	AMOUNT PAID
Floyd Smith	$ 65.96
Betty Tennison	65.96
Troy E. Colp, Jr.	65.96
Darryl Rendleman	64.19
Randy K. Evans	64.19
Robert Chamness	64.19
Stella Powers	64.19
Greggory Collins	64.19
Vern L. Rodgers	64.19
Pete Golio	64.19
O. Joe Tasky	65.96
Lyndell Kelley	65.96
Obe Roberts	65.96
Terry L. Ollis	65.96
Freddie Coyser	65.96
Daryl L. Melvin	65.96
Donald Richerson	64.19
Michael Grant	64.19
Ronald Rowe	64.19
James Wagner	64.19
Dale Rentfro	64.19
Lloyd Wilburn	64.19
Greg Sloan	64.19
Frank R. Hess	64.19
T. Scott Williams	64.19
Jaceson K. Wall	64.19
Floyd S. Rotramel	65.96

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 9 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 81-73-M
Petitioner	:	A/O No. 11-01098-05001
v.	:	
	:	Baugh Pit & Mill
ELBERT BAUGH EXCAVATING, INC.,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Don C. Hammer, Esq., Hayes, Schneider, Hammer & Miles, Ltd., Bloomington, Illinois, for Respondent.

Before: Judge Charles C. Moore, Jr.

On October 15, 1980, Inspector Henson issued Citation No. 049957 alleging a violation of 30 C.F.R. § 56.9-22 because "the elevated roads around the top of the pit walls were not provided with berms." Respondent operates a gravel pit which is more or less rectangular. The east-west road cited is at the southern end of the pit and the north-south road cited is at the eastern edge of the pit. The inspector thought that 300 feet of the east-west road needed berms and that 200 feet of the north-south road needed them.

The mine is developing toward the east, and the western edge of the pit is being filled in as the mine advances. The north-south road is therefore one which moves eastward as the mine is advanced. When the overburden is stripped on the eastern edge of the pit, it creates a drop-off of some 8 to 10 feet and a bench is created, but when the gravel is later taken out, the bench disappears and the drop-off is in the neighborhood of 20 to 25 feet. Respondent maintains
way running north and south is always 60 feet from the e
and that the roadway advances eastward as the stockpiles
gravel piles advance in that direction. The Governmont
vehicles near this edge of the pit but he did see t
indicated to him that vehicles had been c
drop-off. Respondent's response is that
having been made back when the road was i
edge of the pit was farther west. It mai
for any of its vehicles to be closer thar
drop-off and that that edge is not a roac

I find Respondent's position persuasive insofar as the north-south road goes. If it were a bench with a highwall on one side and a drop-off on the other, 80 or 90 feet wide, I might well hold that the entire plateau was a roadway, but where there is no evidence that equipment had to turn around in the area and the route that the equipment was required to travel was never closer than 60 feet from the drop-off, I hold that the roadway did not extend over to the edge of the pit. There is no requirement that pit walls be bermed. The requirement is only that elevated roadways used for loading, hauling, and dumping be bermed and I am holding, in the circumstances, that the north-south road was not a roadway which was elevated so as to require berms.

The east-west road is a permanent road used by both the mine and the farmer who owns the land to the south of that road. While the primary use of this east-west road is not related to loading, hauling, or dumping, it is occasionally used for that purpose and, in my opinion, it is subject to the berm standard. This road, or at least that part of it that Respondent contends is the road, is separated from the south edge of the pit by about 10 feet. There may be grass or weeds in this 10-foot strip but it is level ground and I hold that it is part of the road. If it is part of the road, then it is elevated and requires berms. */ I am not sure where the line should be drawn as to how close the used part of the roadway needs to be to the drop-off so that it can be considered an elevated roadway, but I think driving within 10 feet of such a drop-off is sufficiently dangerous that the area should be considered an elevated roadway. The fact that Respondent does not own the road is not controlling. (See section 3(h)(1) of the Federal Mine Safety and Health Act of 1977).

I therefore find that the inspector was correct in issuing the citation for the east-west roadway but incorrect for issuing it as to the north-south roadway. He issued only one citation and since there was justification insofar as the east-west road was concerned, I affirm the citation. In my opinion, the negligence here was small. The company is a small company and there was good faith abatement. Gravity is high because a 10-foot deviation in the route could have caused a serious injury. There is no history of prior violations. In fact, in the last 4 years there have been some eight inspections with no citations issued. In the circumstances, the Assessment Office thought $38 was an appropriate penalty. To me, that seems entirely too low an assessment; but in the circumstances of this case where Respondent has won half of this case, I do not feel it would be fair to raise the proposed assessment. It would be like punishing Respondent for daring to challenge the propriety of the citation. On the other hand, I see no reason to cut the penalty in half just because I agree with Respondent as to the north-south road. A penalty of $38 will therefore be assessed.

---

*/ I happened to hear the first non-coal case under the Federal Mine Safety and Health Act of 1977, and it involved berms. Cleveland Cliffs Iron Company v. Secretary of Labor, VINC 78-300-M (Sept. 8, 1978). I am attaching a copy of that decision and I adopt the discussion of the berm standard contained therein.

ORDER

Respondent is therefore ORDERED to pay to MSHA, within 30 days, a civil penalty of $38.

Charles C. Moore, Jr.
Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Don C. Hammer, Esq., Hayes, Schneider, Hammer & Miles, Ltd., 202 N. Center, P. O. Box 3067, Bloomington, IL 61701 (Certified Mail)

ATTACHMENT

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

September 8, 1978

CLEVELAND CLIFFS IRON COMPANY, Applicant	:	Application for Review
v.	:	Docket No. VINC 78-300-M
	:	Order No. 286165
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	March 20, 1978
	:	Empire Mine

DECISION

Appearances: Ronald E. Greenlee, Esq., Clancey, Hansen, Davidson, Chilman & Graybill, Ishpeming, Michigan, for Applicant; David F. Barbour, Esq., Office of the Solicitor, Department of Labor, for Respondent; Paul Gravedoni, Local Union #4950, United Steel Workers of America, Negaunee, Michigan.

Before: Administrative Law Judge Moore

This is the first noncoal case filed and heard under the new Act 1/ but it involves the old safety standard requiring berms or guards published at 30 CFR 55.9-22 under section 55.9 entitled "Loading, Hauling, Dumping." On page 254 of Volume 30 of the Code of Federal Regulations as revised July 1, 1977, the standard in question is designated section 155.9-22 but since it is preceded by 55.9-21 and succeeded by 55.9-23, I assume the numbering of the standard is a typographical error. In any event, it provides:

> Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

The standards applicable to surface coal mines and surface areas of underground coal mines have an identical provision although with a somewhat different heading at 30 CFR 77.1605(k).

Withdrawal Order No. 286165, which alleges a violation of 30 CFR 55.9-22, was issued on March 20, 1978. This order was based on Citation No. 286163 which was issued on March 16, 1978. The citation and withdrawal order referred to the following conditions:

1/ The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 91 Stat. 1290, which supersedes the 1969 Act.

> Berms or guards were not provided along either side of the elevated pipeline roadway from the laydown area, approximately 600' south to the end of the existing roadway. Vehicles of various types up to and including 120 ton haulage trucks were used on the roadway.

A hearing was held on the merits on May 23, 1978, in Ishpeming, Michigan. The evidence pertaining to the Application for Review and also the Civil Penalty Case stemming from Withdrawal Order No. 286165 was presented in this proceeding by stipulation of the parties.

While the facts in the instant case are quite clear, the applicability of the regulation to those facts is not at all clear. The road in question is under construction (Tr. 52), is elevated in some areas (Tr. 32, 51) and is approximately 100 feet wide (Tr. 26). When completed it will be used to carry a tailings pipe to a tailings dump and as an access road to the pipe for repair and maintenance purposes (Tr. 114). At the present time, however, or at least until the order was issued, it was a road under construction and the operator was constructing it by having trucks haul rock and dirt along the road, dumping them over the end and then having a bulldozer smooth the surface (Tr. 58). I visited the site of the alleged violation and in my opinion the roadway in that area was elevated approximately 40 feet above the surrounding terrain. In fact, on one side of the road it was about treetop level. The banks were constructed of rock at an angle sharper than 45 degrees, probably closer to 60 degrees. There is therefore no question but that the road is elevated and that it has steep banks which would involve an extreme hazard if a truck were to go over the side. The questions are whether the road was used for "loading, hauling, dumping" and the meaning of the term "outer bank" in the regulation.

I disagree with MSHA's position that all roads are haulage roads and thus require berms when they are elevated (Tr. 64, 74). The standard is restricted to roads where either loading, hauling or dumping is taking place (30 CFR 55.9). On the other hand I cannot agree with the contentions of Applicant's witness Joseph Crites, the mine manager, to the effect that only ore haulage constitutes "haulage" (Tr. 123, 124, 130). The trucks involved in building this road were hauling rock and dumping it over the edge and I do not see how I could possibly find that this road, at least while it is under construction, is not used for hauling and dumping.

If this road is constructed and used eventually as a pipeline road as described by the witnesses and depicted in one of the exhibits (App. Exh. 1, Tr. 112, 114, 119), it may not be involved in hauling, loading, or dumping and the standard in question, unless it is amended may not require berms. The necessity of berms will depend on the facts. I see no logical reason for providing less protection

to the users of an elevated road merely because it is no longer used for hauling, dumping or loading, but I do not promulgate the standards. But in any event, the road while being constructed, is covered by the standard and in its elevated portions requires berms "on the outer bank."

The use of the term "outer bank" in the regulation indicates that the drafters were thinking of a road elevated by virtue of the fact that it was going up the side of a mountain or other elevated topography so that one side of the road would be next to the mountain and the other side, the outer bank, would be the only place where there was a danger of driving over the edge. With that type of road in mind, the outer bank is obviously the only place where berms would be necessary to protect the vehicle from leaving the road. But while the drafters must have been thinking of that type of road they did not so restrict the standard, because it applies to all elevated roadways used in loading, hauling or dumping. And while a curved road, which is elevated, might be described as having an outer bank and inner bank, a relatively straight road such as the one involved in this case has no outer or inner banks. But it nevertheless has banks.

Inasmuch as it is the elevation which creates the hazard that berms are designed to alleviate, the intent of the regulation must be to require those berms wherever there is a hazard created by the elevation. Therefore, the term "outer bank" means whichever bank is hazardous because of the elevation, and if both sides of the road present a hazard of rolling down a steep embankment, then both sides of the roads are required to have berms.

I find that the road in question, or at least the elevated portions thereof, is required to have berms as long as it is used for hauling and dumping. I therefore affirm the citation and order issued by the inspector.

In affirming the citation and order, I am not accepting MSHA's position that the regulation requires that berms be as high as the midaxle on the biggest piece of equipment which uses the road (Tr. 36). That position may or may not be reasonable but there was no evidence presented which would allow me to decide the issue. Since it was not contested, I am assuming that the piles of rocks that existed on the sides of the road in question were insufficient and that it was therefore proper for the MSHA inspector to issue his citation and order on the ground that the berms required by the regulations did not exist. I cannot decide the appropriate height required merely on the basis of the written publications of MSHA which are referred to as "applications" in the testimony and in one of the exhibits (Tr. 36, Govt. Exh. #3). The decision here is that berms are required on the road in question and the assumption, because of the absence of a challenge, is that such piles of rocks as did exist did not constitute the required berms.

Inasmuch as the evidence normally associated with a civil penalty case was, by agreement of the parties, presented in this case so that only one hearing and decision would be necessary to decide all issues, I find that the company is large, that no penalty assessed will affect its ability to continue in business, that the violation could contribute to serious injury but that in view of the doubts about the requirement of the regulation very little negligence was involved. The operator has no history of prior violations and insofar as the safety of the miners is concerned ceasing construction of the road had the same effect as good faith compliance because it eliminated the possibility of injury to a miner. In fact, ceasing construction was even more to the interest of the miner than rapid compliance since the berms of the height which MSHA considers necessary would not stop a runaway coal truck, but at best, might slow it down in order to give the driver sufficient time to jump (Tr. 99).

In the circumstances I find that a penalty of $200 is appropriate.

ORDER

It is therefore ORDERED that Cleveland Cliffs Iron Company, within 30 days of the issuance of this decision, pay to the Secretary of Labor a civil penalty in the amount of $200.

It is further ORDERED that the citation and order of withdrawal are AFFIRMED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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Marco D. Vestich, Assistant to Director, Safety and Health Dept., United Steelworkers of America, Five Gateway Center, Pittsburgh, PA 15222

Mr. Paul Gravedoni, President, Union Local #4950, United Steelworkers of America, 936 Baldwin Street, Negaunee, MI 49866

Acting Administrator, Mine Safety and Health Administration, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 81-117-M
Petitioner	:	A/O No. 33-00161-05011F
v.	:	
	:	Fairborn Plant Mine
SOUTHWESTERN PORTLAND CEMENT,	:	
COMPANY,	:	
Respondent	:	

DECISION

The Secretary has filed a motion to withdraw its penalty proposal and dismiss this case. His motion is not filed because there is some infirmity in the case, but because Respondent has tendered the full amount of the proposed assessment and "withdrew its Notice of Contest of the Civil Penalty . . . ." The Secretary relies on the Commission's decision in Secretary of Labor v. Mettiki Coal Corp., Docket No. YORK 80-140 (Oct. 16, 1981).

I am not sure what the Commission intended by its Mettiki opinion, but there are clearly some things that it did not intend. It did not intend to indicate that the fact that the amount of the penalty the Respondent proposed to pay was the same as the "proposed assessment" was of great significance. And it did not hold that the parties could circumvent the Commission's settlement procedures by trying to accomplish by motion to withdraw what they could not do by a motion to approve settlement. Regardless of the form, this is in essence a settlement and the same standards apply.

In the instant case there was a fatal accident but it appears from the special assessment and the accident report that Respondent was in no way responsible. It appears to be a "no fault" violation and the nominal $200 assessment seems reasonable. I would have approved this amount if the motion had been for settlement approval and I will approve it by granting the motion.

The motion to withdraw is granted and the case is DISMISSED.

Charles C. Moore, Jr.
Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth St., Cleveland, OH 44199 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

DEC 15 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINSTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 81-495 A.O. No. 46-03092~~-93981~~ 03081
v.	:	Beckley Mine
BECKLEY COAL MINING CO., Respondent	:	

DECISION AND ORDER

For the reasons set forth in my interim decision of November 24, 1981, a copy of which is attached hereto and incorporated herein, the parties' amended motion to approve settlement in this matter in the total amount of $660 is GRANTED. Accordingly, it is ORDERED that on or before Thursday, December 31, 1981, the operator pay the amount of the penalty agreed upon, $660, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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David E. Street, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

ATTACHMENT TO FINAL DECISION DATED DECEMBER 15, 1981.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 24, 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-495
Petitioner	:	A.O. No. 46-03092~~-93981~~ 0308
	:	
v.	:	Beckley Mine
	:	
BECKLEY COAL MINING CO.,	:	
Respondent	:	

INTERIM DECISION AND ORDER

The parties move for approval of a settlement at 100% of the amount initially assessed for the two serious violations of the ventilation standards charged, namely $320.

Keeping line curtain within 10 feet of the working face at all times is, admittedly, a difficult requirement; checking for the presence of a dangerous amount of methane before energizing electric face equipment at a working face is not. Furthermore, line curtain violations that vary up to 10 feet from the norm are not exceptionally hazardous as they are unlikely to trigger a fire or explosion and are easily detected. Detection of a failure to make a methane check is, on the other hand, almost fortuituous. This is because there is no requirement that a record of these checks be made or entered in the on-shift or any other permanent report.

It is not surprising, therefore, that there were 25 previous violations of the line curtain requirement and only one of the methane check requirement during the preceding 24 months.

Because the latter requirement is so vital to safety, so difficult to detect and may result in what amounts to reckless endangerment, I find the amount proposed for settlement of this violation is insufficient to deter future violations and ensure voluntary compliance. It is my considered judgment that this violation, if proved, warrants the imposition of a penalty of $500, not the $160 proposed.

Accordingly, it is ORDERED:

1. That the motion to approve settlement be, and hereby is, GRANTED as to the line curtain violation and DENIED as to the methane check violation.

2. That the operator pay the amount of the penalty agreed upon and approved for the line curtain violation, $160, on or before Friday, December 4, 1981.

3. That unless on or before Friday, December 4, 1981, the parties amend their motion to approve settlement consistent with the views expressed herein, the requirements of the Pretrial Order of October 2, 1981 are reinstated as to the methane check violation, 30 C.F.R. 75.307 with compliance due as to Part A on December 18, 1981 and Part B on January 4, 1982.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 16 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. PENN 81-154 A.O. No. 36-02581-03043
v.	:	Docket No. PENN 81-183 A.O. No. 36-02581-03044
PENN ALLEGH COAL CO., INC., Respondent	:	Allegheny No. 2 Mine

ORDER

Counsel for the Secretary has filed a motion for approval of a settlement agreement in the amount of $1400, 48% of the amount originally assessed for the seven citations at issue. As grounds for this reduction the Secretary cites the respondent's allegedly mistaken reliance on the April 7, 1978 decision of the Administrative Law Judge declaring the cited standard null, void and unenforceable. That decision has been reversed by the Commission. 1/ In addition, the respondent is now participating in a program to retrofit its equipment with cabs or canopies.

In light of the recent Commission decision holding that the defense of diminution of safety is unavailable where the operator has not filed a prior petition for modification, regardless of the danger enforcement of the standard may present to the miners, 2/ the defense raised by the operator has been foreclosed. While it appears that the Commission was without authority or jurisdiction to consider the issue it found dispositive, namely the claimed unavailibility of the "diminution

---

1/ Secretary of Labor v. Penn Allegh Coal Co., Inc., 3 FMSHRC 1392 (June 29, 1981). See also, Secretary of Labor v. Sewell Coal Co., 3 FMSHRC 1402 (June 29, 1981).

2/ Id. at 1398-99.

of safety" defense in an enforcement proceeding, there is no necessity to pursue the consequences of that further in this proceeding. 3/

Accordingly, it is ORDERED that for good cause shown the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $1400.00, on or before Monday, January 4, 1982.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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Glenn E. Bost, II, Esq., Thorp, Reed & Armstrong, 2900 Grant Bldg., Pittsburgh, PA 15219 (Certified Mail)

3/ Under the Mine Safety Law the Commission does not have de novo review powers. Section 113(d)(2)(iii)(A) and (B) of the Act precludes review of any issue not raised before the administrative law judge or covered by the Order Directing Review. In Labor v. Penn Allegh, supra, the record shows and the Commission's decision admits that the issue concerning the "diminution of safety" defense was raised by the Commission sua sponte and that neither the trial judge nor the parties were afforded an opportunity to pass on the matter. Compare, Brown & Root, Inc. v. Marshall, ___ F.2d ___, 1981 OSHD Par. 25,741, p. 32110 (5th Cir. 1981); McGowan v. Marshall, 604 F.2d 885, 889 (5th Cir. 1979).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 21 1981

MARLENE FINN, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	
	:	Docket No. KENT 81-167-D
BROWN BADGETT, INC., Respondent	:	MSHA Case No. MADI CD 81-19

ORDER OF DEFAULT

The case was scheduled for hearing on the merits December 11, 1981 at 9:30 a.m. in Louisville, Kentucky pursuant to a notice of hearing served on both parties.

Upon the Applicant's failure to appear at the hearing at 9:30 a.m. and after waiting two hours for her to appear, the Applicant was held in default at 11:30 a.m. on December 11, 1981.

Wherefore, the Applicant's complaint of Discrimination is DISMISSED on the merits for default and for want of prosecution.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

Mrs. Marlene D. Finn, Route 3, Bruce School Road, Beaver Dam, Ky. 42320

Ralph W. Wible, Esq., 100 St. Ann Building, PO Box 727, Owensboro, Ky. 42320

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 2 2 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. PENN 81-154
	:	A.O. No. 36-02581-03043
v.	:	Docket No. PENN 81-183
	:	A.O. No. 36-02581-03044
PENN ALLEGH COAL CO., INC., Respondent	:	Allegheny No. 2 Mine

ORDER

Pursuant to Commission Rule 65(c) the order issued December 16, 1981 is corrected to reflect approval of the agreement of the parties to settle the above captioned cases for a total of $1800.00. The last sentence of the order is therefore corrected to read: "It is FURTHER ORDERED that the operator pay the penalty agreed upon, $1800.00, on or before Monday, January 4, 1982, and that subject to payment the captioned matters be, and hereby are, DISMISSED."

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

DEC 22 1981

MATHIES COAL COMPANY, Contestant	:	Contests of Citations
	:	Docket No. PENN 81-240-R
and	:	
	:	Citation No. 1142325
CONSOLIDATION COAL COMPANY, Contestant	:	September 11, 1981
v.	:	Mathies Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 81-241-R
	:	
	:	Citation No. 1050290
	:	September 11, 1981
	:	
	:	Westland Mine

DECISION

Appearances: Jerry F. Palmer, Esq., Pittsburgh, Pennsylvania, for Contestant;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon notices of contest filed by the Mathies Coal Company (Mathies) and the Consolidation Coal Company (Consolidation) under section 105(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," challenging the validity of citations issued pursuant to section 104(a) of the Act. Hearings were held in these cases in Pittsburgh, Pennsylvania, commencing October 27, 1981.

Docket No. PENN 81-240-R

The issue before me in this case is whether there was a violation of the mandatory standard at 30 C.F.R. § 75.1405 as alleged in Citation No. 1142325, and if so, whether that violation was "significant and substantial" as defined in the Act and as interpreted in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC at 825 (1981).

Citation No. 1142325 alleges as follows:

> There were four supply cars located on the No. 2 Thomas supply track, at Thomas Portal bottom, that were equipped with automatic couplers. However, chains or rings in addition to automatic couplers are used on the automatic couplers, and a bar is used to uncouple the supply cars which is not approved device.

The cited standard provides as follows:

> All haulage equipment acquired by an operator of a coal mine on or after March 30, 1971, shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on March 30, 1970, shall also be equipped within 4 years after March 30, 1970.

The essential facts are not in dispute. On September 11, 1981, Francis Wehr, a coal mine inspector for the Mine Safety and Health Administration (MSHA), was performing a regular inspection of the Mathies Mine accompanied by his supervisor, William Dupree, the company safety inspector, Mr. Hamilton, and a union representative. At the Thomas portal, they observed eight to 10 rail cars coupled together on the supply track. A combination of coupling systems was employed on the cars. Two of the systems were found by Inspector Wehr to be in violation of the cited standard. The cited coupling systems combined an automatic coupler, which coupled by impact and which uncoupled without the necessity of persons going between the ends of the rail cars, and a link chain or metal ring which did not couple by impact but which could have been uncoupled without the necessity of persons going between the ends of the rail cars if a specialized "safety bar" was used. The chains and rings were engaged and disengaged from hooks attached to the automatic couplers either by hand or by the use of the "safety bar." In the former instance, miners would necessarily place themselves between the ends of the rail cars to engage or disengage the chain or ring. In the latter instance, if the "safety bar" was correctly used, miners would not necessarily be positioned between the ends of the rail cars.

The purpose of the standard here cited 30 C.F.R. § 75.1405, is to prevent miners who must couple and uncouple haulage equipment from subjecting themselves to injury by going between the ends of haulage cars. Pittsburgh Coal Company v. Secretary, 1 FMSHRC 1468 (October 1979). In that case, a miner was fatally injured while attempting to uncouple two haulage cars. All of the haulage cars had operable disconnect levers on one side, and some of the cars had additional disconnect levers on the other side as well. Not all of the additional levers were operable, however, and the victim had attempted to uncouple with one of the inoperable levers. When the lever failed to work, he reached between the ends of the cars to manually disconnect them. The locomotive operator, unaware that the victim was between the cars,

started the train and the victim was crushed. In rejecting the operator's argument that it had been in compliance with the cited standard because it had uncoupling devices operable on one side, the Commission stated that the purpose of the standard was best effectuated by requiring that all uncoupling devices be maintained in an operable condition. The Commission observed that an inoperable device might induce a miner to go between the ends of the haulage equipment to attempt manual uncoupling. As the Commission further noted, the miner was killed after going between the ends of haulage cars after unsuccessfully attempting to use an inoperable device and that the standard was designed to prevent exactly that type of accident.

In Canterbury Coal Company, 6 IBMA 276 (1976), aff'd., Canterbury Coal Company v. Kleppe, 559 F.2d 1207 (3rd Cir. 1977), a petition for modification of the application of the standard here cited was rejected because a link-aligner system used by Canterbury was found to be unacceptable. Canterbury's link-aligner system was apparently similar to the chain, ring and hook systems used by Mathies in this case in that if certain specific procedures were invariably followed, there would be no need for mine personnel to go between rail cars during coupling and uncoupling operations. The problem with any of these systems is, however, similar to that described by the former Interior Board of Mine Operations Appeals in Canterbury:

> While the testifying motorman might well do as he said at all times, we must always consider what might occur if someone else were performing the coupling. Another miner, substituting for the regular motorman, might not be so conscientious or might be confronted with an emergency situation and perform a coupling or uncoupling without thinking to use the link aligner. Further, * * * even though only a short distance away * * * a substitute might be inclined to perform a coupling without employing the link aligner. Such is not the case with automatic couplers which couple on impact. An automatic coupler is always available and except for the possibility that it might require positioning within its gathering range, it does not require human input to perform a coupling.

The chain and ring systems utilized by Mathies present the same hazard as the link-aligner found inadequate in Canterbury. Thus, a miner not familiar with the coupling and uncoupling operations might be called upon to perform such work. In addition, the "safety bar" needed under Mathies' system to position the chain and ring might not be immediately available to the miner. Indeed, the undisputed testimony in this case is that "8 out of 10 times" the "safety bar" was in fact not available when needed. Moreover, because of the difficulty of manipulating with an extended bar, there is always the temptation for the miner to perform the task manually without the safety bar. As noted in Canterbury, the automatic coupling system mandated in the cited standard essentially eliminates the possibility of these occurrences.

Under the circumstances, I conclude that the coupling systems here cited do not meet the requirements of the standard at 30 C.F.R. § 75.1405. The

systems as a whole admittedly did not couple on impact under any circumstance. In addition, since the uncoupling operation of these systems presents the same hazard found unacceptable in the Pittsburgh Coal and Canterbury Coal cases, it is clear for this additional reason that the systems are in violation of the cited standard. 1/

Whether a violation is "significant and substantial" depends on whether "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature." Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC at page 825 (1981). The test has essentially two aspects: the probability of resulting injury and the seriousness of resulting injury. Within this framework, I indeed find that the violation here was "significant and substantial."

The undisputed evidence in this case demonstrates that serious injuries and fatalities have resulted from miners positioning themselves between the ends of rail cars. In particular, case histories have shown that such incidents occurred where the miner placed himself between the cars in efforts to manually operate a coupling mechanism. While the hazard herein may have been reduced somewhat as a result of company directives and training given subsequent to the citation at issue, the determination of "significant and substantial" must be made in view of the facts existing at the time the citation was issued. The undisputed evidence in this case shows that before company directives were issued and a training program was instituted on September 23, 1981, employees responsible for coupling and uncoupling the subject rail cars had received no training in the use of the "safety bar." One witness testified that in any event "eight times out of 10" the safety bars were not even available during coupling and uncoupling operations. It was accordingly not uncommon for employees to manually engage and disengage the chains and rings while positioned between the rail cars. MSHA supervisor William Dupree also opined that serious injuries and fatalities were highly probable under the circumstances. If the cars should move while the miner is between them, crushed or broken fingers and hands and even fatal injuries were likely. According to Dupree, not even the so-called "safety bar" was free of hazard. An employee could be dragged by the "safety bar" into the path of the cars upon sudden movement of those cars.

1/ Mathies appears to suggest that, even assuming there was a violation, it would diminish safety to require abandonment of the chain and ring system here employed. It is now clearly established however that such a contention must be first resolved in a modification proceeding under section 101(c) of the Act. Secretary v. Penn Allegh Coal Company, 3 FMSHRC 1392 (1981). The assertion is accordingly premature in this proceeding. Apparently, in anticipation of a petition for modification being filed in the matter here at issue, MSHA had, presumably under the provisions of 30 C.F.R. § 44.16, allowed interim relief to Mathies to permit continuing operations under strict controls.

While Mine Safety and Health Committeeman Jack Schmitt testified that he had begun, at least a month before the citation herein was issued, to notify miners to use the safety bar for coupling and uncoupling operations, it is not clear how many miners were actually so notified or what effect that advice might have actually had. Accordingly, I do not find that the hazard was reduced in any significant way by Schmitt's efforts.

Under the circumstances, Citation No. 1142325 is AFFIRMED with its attendant "significant and substantial" findings. The contest, Docket No. PENN 81-240-R, is accordingly DISMISSED.

Docket No. PENN 81-241-R

Because of the legal and factual similarities between the citation in this case, No. 1050290, and the citation in Docket No. PENN 81-240-R, the parties agreed at hearing that the disposition of that case would be controlling in this case. Accordingly, Citation No. 1050290 is also AFFIRMED and the contest, Docket No. PENN 81-241-R, is DISMISSED.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 23 1981

C F & I STEEL CORPORATION, Applicant,	APPLICATION FOR REVIEW
v.	DOCKET NO. WEST 80-350-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Order of Withdrawal No. 827038 Mine: Allen

DECISION AND ORDER

APPEARANCES:

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For the Respondent

BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

This proceeding involves an application for review of an imminent danger order of withdrawal pursuant to the provisions of section 107 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. On June 12, 1980, Applicant, C F & I Steel Corporation [hereinafter "C F & I], filed with the Commission its Application for Review. Respondent, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"] responded to the application for review by filing an Answer with the Commission on July 14, 1980. Pursuant to notice, a hearing on the merits was held in Pueblo, Colorado.

FINDINGS OF FACT

1. C F & I is the operator of an underground coal mine located near Weston, Colorado, known as the Allen Mine.

2. Products of the Allen Mine enter or affect interstate commerce.

3. On May 8, 1980, a C F & I section foreman, in the company of MSHA inspectors, was conducting face checks for accumulations of methane prior to the commencement of work by his crew. In the crosscut between entries No. 2 and No. 1, the section foreman detected a 1.5 per centum concentration of methane near a rib. Utilizing a permissible methane detector similar to the one used by the foreman, an inspector detected accumulations of methane in concentrations of 1.8 and 2.1 per cent. Two vacuum bottle air samples were taken by the inspector at a point twelve inches from the roof, the right rib and the face area of the advancing crosscut. Upon subsequent analysis, the two air samples revealed methane concentrations of 1.53 and 1.83 per cent.

4. Order of Withdrawal No. 827038[1]/ was issued to C F & I by the inspector pursuant to the imminent danger provision of the Act, section 107(a), and a citation provision of the Act, section 104(a). In the part and section category of the order, the inspector alleged a violation of

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1/ The "CONDITION OR PRACTICE" cited alleges:

"Upon arriving in section 1 south off 1 east section [unintelligible characters] 041-0 at 7:00 a m an accumulation of methane was detected in the face by a prmissible (sic) methane detector The CH4 ranged from 1.8 to 2.1 per centum citation 75.308 This section is normaly (sic) provided ventilation by an auxiliary fan had been deenigized (sic) by the night shift and no means was provided to ventilate the face area to prevent accumulations of methane a citation of 75.302-4(d) This condition was observed in the last crosscut between No 1 and 2 - entry".

30 C.F.R. § 75.308.[2]/ The inspector did not mark the "CITATION" box on the order issued to C F & I , but the "ORDER OF WITHDRAWAL" box was marked with an "X".

5. Upon discovering the accumulation of methane, the section foreman assembled his crew and put them to work clearing the mine atmosphere of the gas. The crew tightened the existing brattice line, eliminating any gaps, and installed additional brattice in the crosscut extending towards the face area. Within 35 minutes of the time the order of withdrawal was issued, the condition was abated by increased ventilation of the crosscut.

6. Methane is potentially explosive in air when present in concentrations of 5 to 15 per cent by volume.

7. At the time the imminent danger withdrawal order was issued, and immediately prior thereto, no miners were present at the working face where the methane was detected. The miners waited in a lunchroom in a different entry while the section foreman completed his face checks for methane. No power was energized in the section at the time the order was issued or prior to its termination. No production was ongoing. The area covered by the order of withdrawal was well rock dusted. A volume of approximately 13,000 c.f.m. of air was present at the last open crosscut at the time the order issued. After the order of withdrawal was issued, only authorized personnel were allowed into the subject area and the only work performed there were attempts to establish a greater volume of ventilation.

2/ § 75.308 Methane accumulations in face areas.

[STATUTORY PROVISIONS]

If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104[c] of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

ISSUES PRESENTED

1. Whether the conditions which existed in C F & I 's Allen Mine, at the time the order of withdrawal was issued, constituted an imminent danger?

2. Whether a violation of a mandatory safety and health standard, capable of supporting a penalty, occurred at C F & I 's Allen Mine?

DISCUSSION

Supporting its case for vacation of the imminent danger order of withdrawal, C F & I cites the decision of Secretary of Labor, Mine Safety and Health Administration (MSHA) v. C F & I Steel Corporation, 3 FMSHRC 99 (1981). In that case, I dismissed an imminent danger order of withdrawal issued to C F & I when mine personnel were in the process of attempting to clear an accumulation of methane in a belt haulage entry by increasing ventilation of the area. The concentration of methane involved was demonstrated to be somewhere between 1.42 and 1.86 per cent.

The significant fact involved in that case was that when the inspector issued the order of withdrawal, C F & I was already doing everything it possibly could do to abate the condition. The work was being done only by those persons who would have been authorized to be in the area had an imminent danger order been in effect. The critical distinction between the cited case and the case at bar is that, in the former case, abatement was already in progress and being performed by authorized personnel. Here, even though no production was ongoing, abatement had not yet commenced.

C F & I emphasizes that no miners were present in the section covered by the imminent danger order of withdrawal. Pursuant to C F & I preshift policy, the miners waited in a lunchroom located in a different entry, some 300 feet from where the methane was detected, while the section foreman completed his face checks for methane. Following that practice, only when the section foreman had completed his face checks, determined it was safe and personally energized the section power source would the miners be allowed to enter the working section. I must conclude, however, that the conditions which existed at C F & I 's Allen Mine, at the time the order of withdrawal was issued, constituted an imminent danger.

For the proposition that the presence of 1.5 volume per centum or more
r of law, requires the issuance of a withdrawal
ites the decision of Pittsburgh Coal Company, 2 IBMA
etary contends that an imminent danger order must be
miners are in the affected area since one purpose of
to insure that miners remain out of the affected area
s corrected. For this proposition, the Secretary
The Valley Camp Coal Company, 1 IBMA 243 (1972).

I would characterize the holding of the first cited case somewhat differently. Pittsburg Coal Company, supra, stands for the proposition that the presence of 1.5 volume per centum or more of methane will support the issuance of an imminent danger withdrawal order. Id. at 277, 279. The Valley Camp Coal Company, supra, stands for the proposition that an order of withdrawal can properly be issued if no miners are in the mine because an order of withdrawal not only takes the miners out of the mine, but also keeps them out until the danger has been eliminated. Id. at 248. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. C F & I Steel Corporation, supra. I concluded that the danger presented by the accumulation of methane had been eliminated. That is not the case with the matter at hand. The accumulation of methane that existed on May 8, 1980, having been only recently discovered, could reasonably be expected to cause death or serious physical harm before the danger posed had been eliminated. No abatement was in progress. Therefore, I find that the order of withdrawal is valid and should be affirmed.

On the issue of whether or not a mandatory safety or health violation occurred, I find for the Applicant. The mandatory safety and health standard allegedly violated was 30 C.F.R. § 75.308 (see footnote 2/ page 2). Given the facts as found, it is clear that when the air at the working face was found to contain 1.0 volume per centum or more of methane, C F & I at once made changes or adjustments in the ventilation of the Allen Mine to reduce the methane concentration to less than 1.0 per cent. While such changes or adjustments were underway and until they had been achieved, the power to electric equipment in the area remained off, no production was ongoing, and due precautions were exercised by C F & I so as not to endanger other areas of the mine. Additionally, all persons other than those referred to in section 104(c) of the Act were withdrawn to a safe area of the mine. On these facts, no violation of the mandatory safety and health standard contained in 30 C.F.R. § 75.308 occurred and I cannot sustain the violation alleged in Order of Withdrawal No. 827038.

The condition or practice cited in the order also makes reference to an alleged violation of 30 C.F.R. § 75.302-4(d).[3]/ No evidence is contained in the record regarding the use vel non of auxiliary fans, the existance of scheduled idle periods or the ventilation scheme in use at the Allen Mine. Therefore, I have no basis upon which to sustain the violation of 30 C.F.R. § 75.302-4(d) alleged in Order of Withdrawal No. 827038.

3/ § 75.302-4 Auxiliary fans and tubing.

(d) In places where auxiliary fans are used, the ventilation during scheduled idle periods such as weekends and idle shifts, shall be by means of the primary air current conducted into the place in a manner to prevent accumulations of methane.

As no violation of a mandatory safety or health standard was found to exist, it is not necessary for me to rule on the significance of the fact that the "CITATION" box on the order was not marked, how that fact affects the sufficiency of the order as a section 104(a) citation or whether C F & I was given adequate notice that a citation alleging a violation of 30 C.F.R. § 75.302-4(d) was being issued.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The conditions which existed at C F & I 's Allen Mine on May 8, 1980, did constitute an imminent danger at the moment that Order of Withdrawal No. 827038 was issued.

3. The order was valid and should be affirmed.

4. The alleged violation of 30 C.F.R. § 75.308 contained in Order of Withdrawal No. 827038 was not proven by a preponderance of the evidence.

5. The allegation was not sustained and should be vacated.

6. The alleged violation of 30 C.F.R. § 75.302-4(d) contained in Order of Withdrawal No. 827038 was not proven by a preponderance of the evidence.

7. The allegation was not sustained and should be vacated.

ORDER

Based upon the foregoing findings of fact and conclusions of law, Order of Withdrawal No. 827038 is AFFIRMED, the violation of 30 C.F.R. § 75.308 alleged therein is VACATED and the violation of 30 C.F.R. § 75.302-4(d) alleged therein is VACATED. This proceeding is hereby DISMISSED WITH PREJUDICE.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
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DEC 23 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RICHARD M. ATKINSON, doing business as SOMIS SAND & ROCK CO., Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 80-467-M A/C No. 04-01951-05003 MINE: Balcolm Canyon Plant

Appearances:

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For the Respondent

Before: Judge Jon D. Boltz

DECISION AND ORDER

The Petitioner filed a petition proposing that civil penalties be assessed against the Respondent for the alleged violation of five regulations promulgated pursuant to the Federal Mine Safety and Health Act of 1977 ("Act"). The alleged violations took place at Respondent's sand and rock operation on April 2 and April 3, 1980. In its answer, the Respondent generally denied the allegations of the Petitioner.

At the commencement of the hearing on the issues, counsel for the Petitioner stated that the parties had reached a proposed settlement of all issues. Based upon statements of counsel for the Petitioner, I make the following findings:

1. Respondent has a history of eight assessed violations.

2. Respondent is a small operator with production of 11,943 tons per year.

3. The proposed penalties will not impair the ability of the Respondent to continue in business.

4. There was demonstrated good faith by the Respondent in achieving rapid compliance after notification of the alleged violations.

Considering the above findings, the statements filed by counsel for the parties, as well as the proposal for settlement as stated by counsel for the Petitioner, I find that the proposal for settlement should be approved.

Citation No. 384514

A violation of 30 C.F.R. 56.11-12 was alleged as a result of an unsafe travelway in that there was an open hole approximately 18" x 18" in the work deck at the discharge hopper. A worker could have fallen into it and been injured. Respondent's statement is that there was a support platform approximately 3 inches under the deck which contained the opening, thereby preventing men and material from falling into and being injured by the opening. The parties agreed that a penalty of $70.00 would be reasonable for the violation.

Citation No. 384516

This citation alleges a violation of 30 C.F.R. 56.4-11. The Petitioner alleges that the power supply to a cone crusher, that had been removed, had three bare leads coming out of the cable. There was a shock hazard because this cable could have been contacted by persons working in the area. The Respondent's statement is that the circuits were deenergized. The parties stipulate that a reasonable penalty would be $90.00.

Citation No. 384517

This citation alleges a violation of 30 C.F.R. 56.9-7. It is alleged that the walkway side of the gravel conveyor was not provided with adequate guarding or an emergency stop device along the length of the elevated conveyor. The Respondent's statement is that parts of the existing guards were temporarily removed for cleaning and repair work. The parties have agreed that a reasonable penalty for the violation would be $65.00.

Citation No. 384518

A violation of 30 C.F.R. 56.12-32 is cited. The Petitioner alleges that there was wiring coming out of the junction box on the southeast support leg of the dry plaster sand storage bin. This condition presented a potential shock hazard to persons coming into contact with the structure. The Respondent's statement is that the equipment involved was situated in an abandoned part of the mine. All lines were deenergized and the wires were taped off and had been isolated. No employees were working in the abandoned section of the mine. The parties stipulate that proposed penalty of $65.00 would be reasonable.

Citation No. 384529

Petitioner alleges a violation of 30 C.F.R. 50.40(b) and specifically alleges that records, including quarterly reports and accident reports, were not being maintained at the mine office located on the property. Respondent's statement is that the reports were temporarily transferred to the main office for information necessary to answer allegations contained in a complaint filed by MSHA against the mine operator. The parties agree that a penalty assessment of $10.00 would be reasonable.

The foregoing penalty assessments total $300.00. The parties further stipulate that to ease the difficulty of making payment in full immediately, four consecutive monthly installments of $75.00 each will be paid commencing December 15, 1981. The final monthly installment will thus be paid March 15, 1982, making a total of $300.00.

From the bench I approve the proposed settlement, including the method of payment. This approval was made after considering the statutory criteria set forth in section 110(i) of the Act.

ORDER

The settlement approved from the bench is hereby AFFIRMED.

The Respondent is ORDERED to pay civil penalties in the total amount of $300.00. This judgment is to be satisfied by paying monthly installments of $75.00 each, commencing December 15, 1981, and on the 15th day of each month thereafter, including March 15, 1982, until a total of $300.00 has been paid.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 29 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 80-171
	:	Assessment Control No. 44-04880-03027 V
v.	:	
	:	No. 1 Mine
ABSOLUTE COAL CORPORATION, Respondent	:	

SUMMARY DECISION

A notice of hearing was issued on August 10, 1981, in the above-entitled proceeding providing for a hearing to be held on September 16, 1981. Prior to the date of the hearing, counsel for the parties filed on September 15, 1981, a joint stipulation of undisputed material facts and a motion for summary decision pursuant to 30 C.F.R. § 2700.64. Counsel for the parties also indicated that they would file briefs in support of their respective positions. Counsel for respondent 1/ submitted on November 3, 1981, a memorandum in support of his request for summary decision and counsel for the Secretary of Labor submitted on November 19, 1981, a memorandum in reply to respondent's memorandum.

Stipulations

The parties' stipulations are set forth below:

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. Absolute Coal Corporation and its No. 1 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

3. Absolute Coal Corporation owns and operates the No. 1 Mine located in Bee, Dickenson County, Virginia.

4. A violation of mandatory safety standard 30 C.F.R. 75.316 occurred on January 2, 1980, at Absolute's No. 1 Mine as charged in Withdrawal Order No. 0686121.

1/ After the decision in this proceeding had been written, but before the decision had been issued in final form, the attorney who wrote respondent's memorandum in this proceeding filed a letter on December 23, 1981, stating that he no longer is employed by respondent and that respondent's parent, AOV Industries, Inc., has initiated bankruptcy proceedings. Therefore, this decision is being sent to the attorney who represents respondent's parent in the bankruptcy proceedings instead of to the attorney who wrote respondent's memorandum.

5. A violation of mandatory safety standard 30 C.F.R. 75.200 occurred on January 2, 1980, at Absolute's No. 1 Mine as charged in Withdrawal Order No. 0686122.

6. The civil penalty of $2,000.00 that has been proposed for the violation charged in Withdrawal Order No. 0686121 is reasonable in light of the six statutory criteria set forth in Section 110(i) of the Act.

7. The civil penalty of $2,000.00 that has been proposed for the violation charged in Withdrawal Order No. 0686122 is reasonable in light of the six statutory criteria set forth in Section 110(i) of the Act.

8. On or about October 26, 1979, Respondent retained Apple Mountain Coal Company (Joe Davis) as a contract miner (hereinafter the "contractor"), for the Absolute No. 1 Mine, pursuant to a Contract Mining Agreement ("Agreement") and equipment lease. (See Discovery Documents.)

9. These contracts constitute the only relationship or affiliation between Respondent and the contractor. (See Respondent's Answers to Petitioner's Interrogatories; "Answers" No. 3, 12, 15, et al.).

10. On or about January 2, 1980, Petitioner issued citations for violations of federal law committed by the contractor. (See answer No. 12).

11. On July 1, 1980, Petitioner promulgated certain amendments to 30 C.F.R. Part 45 and further published an Enforcement Policy and Guidelines for Independent Contractors ("Guidelines") 45 F.R. 44494-98.

When respondent's counsel submitted his memorandum in support of his request for summary decision, he prefaced his arguments with four paragraphs under the heading "Statement of Material Facts Concerning Which There Is No Material Dispute". His memorandum does not specifically state that counsel for the Secretary has jointly agreed to sponsor the additional "Statement of Material Facts" and, while the Secretary's counsel does not deny the accuracy of the additional "Material Facts", she does not state that she agrees with them or that she participated in their preparation. Except for Stipulation No. 11 above, which is simply a statement of that which has been published in the Federal Register, the additional facts are taken from materials which respondent supplied in reply to petitioner's interrogatories and the additional statement of facts appears to be accurate. Therefore, I have added the four additional statements of material fact set forth in the preface to respondent's memorandum to the original stipulations submitted by the parties. The four additional statements appear as Nos. 8 through 11 in the stipulations above.

Issue

The only issue raised in respondent's memorandum (p. 2) is whether respondent should be cited or assessed penalties for violations of law committed by a third-party contract miner.

Consideration of Parties' Arguments

Respondent Should Not Be Cited for the Violations Here Involved

In support of its argument that it should not be cited for the violations involved in this proceeding, respondent's memorandum (p. 2) relies upon the provisions of its mining agreement with Apple Mountain Coal Company, or contractor, to argue that the contractor should be held liable for the violations. Respondent refers to the provisions of the mining agreement for the purpose of showing that the contractor was obligated (1) to produce the coal reserves until they were exhausted, (2) to conduct mining operations in a workmanlike manner, (3) to comply with all applicable laws and regulations, (4) to indemnify respondent against any breach of MSHA's regulations or the Act, (5) to accept the coal properties as they existed at the time the agreement was signed in October 1979, and (6) to perform as an independent contractor with power to control the acts of its employees. Respondent uses the aforesaid contractual obligations to reach a conclusion that it was the contractor's responsibility to comply fully with the Act and the regulations promulgated thereunder.

After having asserted that the contractor was liable for its own violations, respondent's memorandum (p. 3) proceeds to review MSHA's comments in the Federal Register (Stipulation No. 11, supra) pertaining to MSHA's decision to cite independent contractors for violations which occur as a result of their work at coal or other mines. Respondent emphasizes MSHA's comments to the effect that health and safety interests at mines will best be served by placing responsibility for compliance with health and safety standards on independent contractors because they are in the best position to prevent safety and health violations in the course of their work and to abate any violations which may occur.

While respondent concedes that MSHA's comments in the Federal Register show that MSHA might hold production-operators liable for violations in some circumstances, respondent argues that those circumstances do not apply in this instance because (1) it was the contractor, not respondent, who failed to comply with the mine's ventilation plan, (2) it was the contractor, not respondent, who failed to comply with the mine's roof-control plan, and (3) it was the contractor's employees, not respondent's employees, who were exposed to hazardous conditions because of the contractor's violations. For the foregoing reasons, respondent contends that only the contractor should be cited for the violations observed by the inspector on January 2, 1980 (Stipulation Nos. 4 and 5, supra).

Petitioner's reply memorandum (pp. 1-2) argues that respondent was properly cited for the violations of section 75.316 and 75.200 because (1) respondent retained the U.S. Department of Labor Legal Identification Number for the mining property involved and also obtained all necessary licenses and permits for authorization to produce coal from respondent's No. 1 Mine, (2) respondent retained the right to have all coal produced from the mine delivered to respondent's preparation plant, (3) respondent reserved the right to enter upon the mine property at all suitable times for the purpose of inspecting the contractor's operations, (4) respondent may require the contractor to cure any potential violations of legally mandated health or safety standards, and (5) respondent owned all the equipment which the contractor used to produce coal. Petitioner concludes from the aforementioned extensive control which respondent exercised over the contractor's operations, that respondent was properly cited for the violations which occurred at respondent's mine.

Petitioner's reply memorandum (p. 3) also argues that an owner of a coal mine should not be able to escape all statutory duties and responsibilities under the Act by entering into contracts under which the owner seeks to transfer all of the owner's obligations under the Act to the contractor who is carrying out the owner's interest in seeing that coal is produced.

I believe that petitioner has correctly pointed out that respondent retained so much control over the operation of the No. 1 Mine that MSHA may properly hold respondent liable for the violations which occurred at respondent's mine. Respondent controlled the operations at the the mine to an even greater extent than petitioner's reply memorandum has indicated. It should be noted that the mining agreement allows the contractor to be paid only $16.50 per ton for clean coal delivered to respondent's preparation plant. From the payment of $16.50 per ton, respondent deducts 50 cents per ton to hold in escrow. The mining agreement also provides that the contractor must deliver a minimum amount of coal per month. If the contractor fails to deliver the minimum monthly tonnage, respondent reserves the right to cancel the agreement and retain all money held in escrow. Respondent also deducts 50 cents per ton from the $16.50 payable to the contractor to reimburse respondent for supplies which the contractor is required to obtain from respondent.

Respondent owns the mining equipment required for the contractor's production of respondent's coal. The only rent which the contractor has to pay for use of respondent's equipment is the contractor's obligation to fulfill the terms of the mining agreement described above. Of course, the contractor has to pay for any repairs which have to be made to respondent's equipment and the contractor must pay for or replace any lost or stolen equipment. The contractor is also required to carry insurance and pay the premiums on insurance covering respondent's equipment.

It is obvious from the above-described provisions of the agreements between respondent and contractor, that respondent has absolute control over the operation of the No. 1 Mine and that the agreements place such severe economic limitations on the contractor that the contractor will find it very difficult to make a profit from extracting respondent's coal. Moreover, the financial constraints placed upon the contractor by respondent will put pressure on the contractor to scrimp on compliance with safety standards in order to save money. An indication of the contractor's lack of funds is shown by the inspector's language in Order No. 686122 which states that the contractor was installing only three rows of roof bolts instead of the four rows required by the roof-control plan. The roof bolts were supposed to have been no more than 48 inches apart, but they were 67 to 68 inches apart, or 20 inches farther apart than they should have been. One way to save money, of course, is to install as few roof bolts as possible. Nothing is more hazardous in an underground coal mine than failing to install an adequate number of roof bolts. The violation of section 75.316 cited in Order No. 686121 also shows a failure of the contractor to supply adequate materials because, according to the inspector's order, the contractor was using line curtain only 48 inches long to ventilate the face area at a time when the mining height was 55 inches.

As I have previously noted, respondent's memorandum (p. 3) concedes that MSHA's comments in the Federal Register refer to circumstances under which it would be appropriate to cite the production-operator for violations, as well as

the independent contractor, but respondent claims that MSHA's comments about citing production-operators do not apply to the circumstances which exist in this proceeding. The comments to which respondent refers are set forth below (45 Fed. Reg. 44,497):

> * * * Accordingly, as a general rule, a production-operator may be properly cited for a violation involving an independent contractor: (1) when the production-operator has contributed either an act or an omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement. * * *

An examination of the above-quoted comments of MSHA in light of the facts in this proceeding shows that respondent comes within MSHA's guidelines under which the production-operator should be cited, in either a separate or joint proceeding, for violations committed by the independent contractor. Although respondent had reserved the right to inspect the contractor's production operations to determine whether the contractor was complying with all safety regulations (Agrement, par. 7), respondent either did not make such inspections or failed to assure that the contractor was complying with the health and safety standards. Such failures constituted an "omission" within the meaning of MSHA's guidelines which would make respondent liable for the violations which occurred while the contractor was producing respondent's coal.

An "act" by respondent which would make respondent liable for being cited for the contractor's violations is the insertion in the agreement between respondent and the contractor of a minimum monthly volume of coal which the contractor is required to produce or run the risk of having the agreement canceled with escrowed funds being retained by respondent (Agreement, pars. 3(c) and 13). Cancellation of the contractor's agreement with respondent would also have exposed the contractor to loss of any funds which it had expended for insurance and repairs on respondent's equipment. Clearly, respondent exercised sufficient control over the production of coal at its No. 1 Mine to subject it to being cited for violations committed by the contractor at its No. 1 Mine.

Petitioner Should Apply its Enforcement Policy Retroactively

The last portion of respondent's memorandum (pp. 3-4) is devoted to contending that MSHA's policy for citing independent contractors for violations of the mandatory health and safety standards should be applied retroactively. Respondent supports its argument about retroactive application of the policy of citing independent contractors by reference to a number of persuasive court decisions, but it is unnecessary to consider those cases because MSHA has already retroactively applied its policy of citing independent contractors for violations of the mandatory standards. In fact, the most recent actions taken by the Commission with respect to citing independent contractors, as opposed to production-operators, or both, was in Pittsburgh & Midway Coal Mining Co., 2 FMSHRC 2042 (1980), in which the Commission remanded a case to

an administrative law judge so that the Secretary of Labor could determine whether to apply the procedures for citing independent contractors for violations as those procedures were set forth in Volume 45 of the Federal Register (Stipulation No. 11, supra). The Commission indicated in its decision that the Secretary was free to proceed against either the independent contractor or the production-operator, or both. The Commission has issued similar orders in at least two other proceedings, remanding the cases for the purpose of allowing the Secretary to apply the rules pertaining to citing independent contractors for violations of the mandatory safety standards (C and K Coal Co., 2 FMSHRC 2047 (1980), and Phillips Uranium Corp., 2 FMSHRC 2050 (1980)).

My decision issued November 30, 1981, in Old Dominion Power Company, Docket No. VA 81-40-R, describes a factual situation in which MSHA applied its procedures for citing independent contractors on a retroactive basis. In the Old Dominion case, an electric power company had installed some metering facilities in a substation located on a coal operator's mine property. One of the power company's employees was electrocuted while performing some work at the substation. The accident occurred on January 22, 1980. After inspecting the site of the fatal accident, an MSHA inspector cited the production-operator for a violation of the mandatory safety standards. After the promulgation of MSHA's regulations providing for the citing of independent contractors, the inspector modified his citation to allege that the power company, or independent contractor, should be cited for the violation instead of the production-operator. The citation was issued against the power company on January 21, 1981, or almost a year after the production-operator had been cited for the violation and about 6 months after the rules for citing independent contractors had been promulgated.

Petitioner's reply memorandum (p. 4) first argues that MSHA's regulations for citing independent contractors should not be applied retroactively. Petitioner's reply memorandum (p. 5) then takes a realistic alternative position and argues that even if the policy for citing independent contractors is applied retroactively, that respondent should be held liable in this proceeding. In support of petitioner's claim that respondent should be held liable, petitioner again refers to the facts in this proceeding which show that respondent retained control of the mine property, retained the right to inspect the operator's activities to assure that the contractor complied with the safety standards, provided the equipment used in mining operations, and otherwise controlled the mining operations sufficiently to be held liable for the violations which occurred at respondent's mine.

As I have indicated above, the Commission has not ruled that MSHA is precluded from proceeding against an owner or a production-operator in any given situation. It is only necessary that MSHA advance reasons for having cited the production-operator in addition or instead of the independent contractor. In this proceeding, MSHA's inspector first wrote the orders in the name of the contractor and then modified the orders to cite respondent because the inspector found that respondent was still shown in MSHA's files as the company which had filed the Legal Identity Report required by 30 C.F.R. § 41.10. If respondent wished to have the contractor shown as the operator of the No. 1 Mine, it should have filed, pursuant to section 41.12, a change showing that respondent was no longer operating the No. 1 Mine.

Respondent's failure to file a change in its Legal Identity Report and its retention of complete control over the mine and all mining operations make it liable for being cited for the violations of section 75.316 and 75.200 as alleged in Order Nos. 686121 and 686122. Inasmuch as respondent has already stipulated that the penalties of $2,000 proposed by the Assessment Office for each violation is reasonable in light of the six assessment criteria set forth in section 110(i) of the Act (Stipulation Nos. 6 and 7, supra), the order accompanying this decision will require that respondent pay penalties totaling $4,000.00.

Nonexistence of an Independent Contractor in This Proceeding

While I have considered the parties' arguments in this proceeding under the assumption that the facts warrant treatment of Apple Mountain Coal Company as an independent contract (Stipulation No. 8, supra), Apple Mountain does not really come within the meaning of an independent contractor as that term is used in the regulations promulgated by MSHA in the Federal Register in Volume 45, pages 44,494 through 44,498.

If one examines the definition of the word "operator" as that term was modified by the 1977 Act, it may be seen at a glance that the independent contractor is described in the last clause of that definition which provides as follows: "'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." The facts in this proceeding show that Apple Mountain would qualify as an "operator" under the foregoing definition, but it would qualify under the word "lessee" because Apple Mountain had become the lessee of respondent's mining equipment and had become the "person" who operated a coal mine for the purpose of producing coal for respondent which was and still is the owner of the No. 1 Mine here involved.

When MSHA promulgated its rules for citing independent contractors, it defined an "independent contractor" in section 45.2(c) as "* * * any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine," whereas a "production-operator" was defined in section 45.2(d) as "* * * any owner, lessee, or other person who operates, controls or supervises a coal or other mine". MSHA's definition of an independent contractor would clearly exclude Apple Mountain as a qualified "independent contractor" and would obviously include Apple Mountain as a "production-operator".

One of the primary reasons for MSHA's having promulgated Part 45 of the Code of Federal Regulations was to establish a procedure whereby actual independent contractors could obtain an indentification number for use by an inspector when he is writing citations or orders for the purpose of alleging that an independent contractor has violated a health or safety standard. The inspector used an independent contractor's identification number when he issued the citation to which I referred in the Old Dominion case, supra. Apple Mountain, as the entity which actually produced the coal at respondent's No. 1 Mine, would not qualify for an independent contractor's identification number under section 45.3 because Apple Mountain was not performing mere services or construction at respondent's No. 1 Mine. Additionally, Apple Mountain would have had no need to comply with section

45.4 of the regulations because they require independent contractors to report to the production-operator the type of work to be performed at the production-operator's mine and the place at the mine where such work is to be performed. Section 45.5 also requires production-operators to provide a complete description of independent contractors' work at their mines, and keep a record of their names and addresses for service of documents, and be able to supply such information to MSHA upon request.

Although respondent was the owner and therefore a production-operator at the time the orders here involved were written, Apple Mountain was also a production-operator at the time the orders were written. Therefore, neither Apple Mountain nor respondent was obligated to keep a record of the type of information required by section 45.4 because there was no independent contractor performing services or construction work at respondent's mine at the time the orders involved in this proceeding were written. Since both Apple Mountain and respondent were production-operators, they were both liable for the violations that occurred at respondent's mine and either or both of them could have been cited for the violations, but the inspector properly issued the orders in the name of the production-operator which had filed a Legal Identity Report with MSHA showing that respondent was the production-operator in charge of all operations at the No. 1 Mine at the time the orders were issued on January 2, 1980.

WHEREFORE, it is ordered:

Absolute Coal Corporation, as the operator of the No. 1 Mine on January 2, 1980, was properly cited for violations on January 2, 1980, and shall, within 30 days from the date of this decision, pay civil penalties totaling $4,000.00 which are allocated to the respective violations as follows:

Order No. 686121 1/2/80 § 75.316	$ 2,000.00
Order No. 686122 1/2/80 § 75.200	2,000.00
Total Civil Penalties Assessed in This Proceeding	$ 4,000.00

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 29 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. CENT 80-388-M A/O No. 34-00033-05003
v.		
		Badger Mine
THE QUAPAW COMPANY,	Respondent	

DECISION

Appearances: Ron Howell, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
W. L. Childress, President, The Quapaw Company, Dumright, Oklahoma, for the Respondent.

Before: Judge Stewart

I. Procedural Background

On February 6, 1981, the Secretary of Labor (Petitioner) filed a complaint proposing penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (Act), charging The Quapaw Company (Respondent) with one violation of mandatory standard 30 C.F.R. § 56.5-50(a). On March 26, 1981, the Respondent filed an answer to the complaint in response to an order to show cause issued by Chief Administrative Law Judge James A. Broderick on March 16, 1981. Subsequent thereto, a notice of hearing was issued.

The hearing was held in Oklahoma City, Oklahoma, with representatives of both parties present and participating. The Petitioner called one witness, Federal mine inspector Millard Smith. The Respondent was represented by Mr. W. L. Childress, the company president, who took the stand and testified as a witness for the Respondent.

Following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, neither party filed a posthearing brief or proposed findings of fact and conclusions of law.

II. Opinion

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of mandatory standard 30 C.F.R. § 56.5-50(a) occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation. Section 110(i) of the Act.

Federal mine inspector Millard Smith issued Citation No. 167396 during the course of his April 1, 1980, inspection of the Respondent's Badger Mine (Exh. P-2; Tr. 5, 19). 1/ The citation charges the Respondent with a violation of mandatory standard 30 C.F.R. § 56.5-50(a) 2/ in that "[t]he 988 Cat loader, S/N 87A6382, was exposed to noise at the level of 157.9%. The maximum permissible limit at any time is 100%. Hearing protection was not being worn" (Exh. P-2).

1/ The Badger Mine was an open-pit limestone mine and related milling operation (Tr. 6).

2/ Mandatory standard 30 C.F.R. § 56.5-50(a) provides as follows:

"No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4--1971, 'General Purpose Sound Level Meters,' approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc. 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

As relates to the fact of violation, the record discloses that the inspector arrived at the mine early enough to obtain an 8-hour noise exposure reading for each of the four employees to whom he attached dosimeters. He calibrated the dosimeters prior to attaching them to the four individuals, and obtained an 8-hour noise exposure reading for each of the four (Tr. 6-7). The results of the survey disclosed that the operator of the Model No. 988 Caterpillar loader was overexposed to noise in that the exposure meter on the the dosimeter read between 157 and 158 percent (Tr. 7-9, 11). Of the four employees sampled, only the loader operator was overexposed to noise (Tr. 7). The inspector then performed some calculations which disclosed that the loader operator had been exposed to noise rated at more than 92 dBA but less than 93 dBA during the 8-hour sampling period (Tr. 8-9, 19-21). 3/ The inspector also noted that hearing protection was not being worn (Exh. P-2). 4/

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fn. 2 (continued)

"NOTE: When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum

$$(C_1/T_1)+(C_2/T_2)+. . . (C_n/T_n)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure. C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

"Log T=6.322-0.0602 SL

Where T is the time in hours and SL is the sound level in dBA."

3/ It appears that the calculations must reveal that the individual has been exposed to more than 91 dBA during an 8-hour sampling period before a citation will be issued on the basis of noise exposure exceeding 90 dBA for an 8-hour period. The inspector testified that both the manufacturer of the dosimeter and the U.S. Department of Labor allow 1 dBA as an error factor for the equipment (Tr. 7, 20, 22).

4/ The use or absence of personal hearing protection on the facts of this case is immaterial to the determination as to whether a violation occurred. Mandatory standard 30 C.F.R. § 56.5-50(b) provides that:

"When employees' exposure exceeds that listed in the [table set forth in 30 C.F.R. § 56.5-50(a)], feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table."

Thus, the law authorizes the use of personal protection equipment as a means of achieving compliance with 30 C.F.R. § 56.5-50(a) only if feasible administrative or engineering controls fail to reduce noise exposure to within permissible levels. The evidence presented in this case clearly shows that feasible administrative or engineering controls existed which could have been utilized by the Respondent to reduce noise exposure to within permissible levels.

Mandatory standard 30 C.F.R. § 56.5-50(a) provides, in part, that no employee shall be permitted an exposure to noise in excess of 90 dBA during an 8-hour period. The results of the April 1, 1980, noise survey disclosed that the loader operator was exposed to noise rated at more than 92 dBA but less than 93 dBA during the 8-hour sampling period. Even allowing for the 1 dBA margin of error (see footnote 3, supra), it is clear that the loader operator was exposed to noise in excess of 90 dBA during the 8-hour sampling period. Accordingly, it is found that a violation of mandatory standard 30 C.F.R. § 56.5-50(a) has been proved by a preponderance of the evidence.

As relates to the gravity of the violation, the standard is designed primarily to afford protection against a partial or total loss of hearing as a result of exposure to excessive noise over a period of time (see, e.g., Tr. 9-10). 5/ Any eventual loss of hearing occasioned by overexposure to noise could reasonably be expected to be permanent (Tr. 9-10).

Applying the 1 dBA margin of error (see footnote 3, supra), the record discloses that the loader operator was exposed to greater than 1 dBA but less than 2 dBA in excess of the allowable exposure during the 8-hour sampling period. Although the inspector testified that he felt the violation was "serious enough" (Tr. 24), he also gave testimony which indicated that the overexposure was not great (Tr. 24). In view of all of the circumstances, it is found that the violation was nonserious and that the gravity was of a moderate nature. 6/

In order to establish that the Respondent demonstrated negligence in connection with the violation, the Petitioner must prove by a preponderance of the evidence that the Respondent either knew or should have known of the violative condition. When asked whether he believed that the mine operator either knew or should have known of the violative condition, the inspector testified that it was "pretty hard to say" that the mine operator knew because he did not believe that a noise inspection had ever been performed on the

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fn. 4 (continued)

Inspector Smith testified that such controls existed in the form of lining the cab with insulation and/or relocating the muffler and exhaust system (Tr. 11-12). In fact, the Respondent abated the citation by relocating the muffler and by running the exhaust pipe approximately 4 to 5 feet farther from the equipment operator's cab. The actions taken to abate the citation achieved compliance with the standard (Tr. 12).

5/ In this regard, it should be noted that the standard prohibits exposure to greater than 115 dBA.

6/ Although it is not determinative of the gravity issue, it should be noted that earplugs had been issued to the loader operator. Mr. Childress gave testimony which seemed to indicate either that the loader operator simply was not wearing the earplugs or that he had lost the earplugs and had not sought replacements from the Respondent. The Respondent has issued earplugs to its employees several times and always keeps replacements available (Tr. 28).

cited loader by the Mine Safety and Health Administration. He also testified that it is rather difficult to detect the difference between 90 and 92 dBA by listening to the equipment because (1) the noise survey measurements are made over an 8-hour period; (2) the difference between 90 dBA and 92 dBA is not very great; and (3) the type of sound involved is a variable which must be taken into account (Tr. 24).

Mr. Childress testified that the Respondent had "no way to know about the noise level" (Tr. 27). He also testified that the Respondent purchased the equipment new in the late 1960's or early 1970's, that the loader was exactly the way it was when it came from the factory, and that it had a good muffler, a cab, doors, and glass (Tr. 27, 29). It should be noted, however, that the windows and doors were open at the time of the inspection (Tr. 23).

In view of the foregoing circumstances, it is found that the Petitioner has failed to prove operator negligence by a preponderance of the evidence. 7/

The inspector testified that the Respondent was cooperative (Tr. 14) and that the Respondent demonstrated good faith in abating the violation (Tr. 23). Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement of the violation.

The evidence presented shows that the size of the Badger Mine was rated at approximately 69,938 man-hours in 1977, 69,089 man-hours in 1978, 57,902 man-hours in 1979, and 15,509 man-hours as of the first 3 months of 1980 (Exh. P-1; Tr. 18). The inspector testified that the facility was a medium size mine for the state of Oklahoma, but indicated that the mine would be classified as small when compared to mine operations throughout the country (Tr. 19). Mr. Childress testified that, as of the date of the hearing, the mine was no longer operational because it had been shut down and the equipment sold (Tr. 29). He also testified that another mine was opened but that it too had been shut down and all of its equipment sold (Tr. 30). The Respondent operated two mines as of the date of the hearing, one a quarry and the other a sand pit. The Respondent operates the sand pit only approximately 1 day per month and the sand extracted is for the Respondent's own use (Tr. 30-31). In view of the foregoing, it is found that the Respondent is a small operator.

7/ The inspector recorded on his inspector's statement that the loader operator led him "to believe that he had complained to management about excess noise on this particular machine" (Exh. P-2). However, the inspector never gave testimony on this point so as to explain the foundation for this belief, and the Petitioner did not prove that the loader operator had in fact complained to the Respondent concerning excessive noise. The statement appearing on the inspector's statement is not considered reliable evidence that such a complaint had been lodged with the Respondent, and cannot form the basis for a finding that the Respondent knew or should have known of the violative condition.

The evidence presented as to the Respondent's history of previous violations shows that the Respondent has no history of violations prior to November 1978. The Respondent was cited for a total of 19 violations from November 1978 through December 1980, and paid assessments for 18 of those cited violations. The 19th violation cited, i.e., the one for which no assessment has been paid, is the violation which is the subject matter of this proceeding. Of the 18 violations for which assessments have been paid, 12 occurred prior to April 1, 1980.

It is well settled that paid assessments are the only assessments properly included in a mine operator's history of previous violations. See Peggs Run Coal Company, Inc., 6 IBMA 212, 83 I.D. 245, 1976-1977 CCH OSHD par. 20,839 (1976); Peggs Run Coal Company, Inc., 5 IBMA 144, 148-150, 82 I.D. 445, 1 BNA MSHC 1343, 1975-1976 CCH OSHD par. 20,001 (1975); Old Ben Coal Company, 4 IBMA 198, 217-218, 82 I.D. 264, 1 BNA MSHC 1279, 1974-1975 CCH OSHD par. 19,723 (1975); Corporation of the Presiding Bishop, Church of Jesus Christ of Latter Day Saints, 2 IBMA 285, 80 I.D. 633, 1973-1974 CCH OSHD par. 16,913 (1973); Valley Camp Coal Company, 1 IBMA 196, 203-204, 79 I.D. 625, 1 BNA MSHC 1043, 1971-1973 CCH OSHD par. 15,385 (1972). Additionally, only those paid assessments for violations charged prior to the one in issue may be properly considered in determining a mine operator's history of previous violations. See Peggs Run Coal Company, Inc., 5 IBMA 144, 82 I.D. 445, 1 BNA MSHC 1343, 1975-1976 CCH OSHD par. 20,001 (1975). Accordingly, I conclude that the Respondent has a history of 12 previous violations which are cognizable in this proceeding. I further conclude that the Respondent's history of previous violations is good.

The Respondent did not introduce in evidence any business or tax records to establish that the assessment of a civil penalty will impair its ability to remain in business. Hall Coal Company, 1 IBMA 175, 180, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972); see also Davis Coal Company, 2 FMSHRC 619, 1 BNA MSHC 2305, 1980 CCH OSHD par. 24,291 (1980). It should be noted that the Respondent was specifically accorded the opportunity to present evidence on this point, but that the Respondent declined to do so (Tr. 29-30). Mr. Childress did testify that the Respondent has assets (Tr. 30).

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), the Federal Mine Safety and Health Review Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Therefore, I find that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to remain in business.

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a $25

civil penalty is warranted for the April 1, 1980, violation of mandatory standard 30 C.F.R. § 56.5-50(a) set forth in Citation No. 167396.

ORDER

Accordingly, IT IS ORDERED that the Respondent pay a civil penalty in the amount of $25 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Distribution:

Ron Howell, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, TX 75202 (Certified Mail)

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Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 29 1981

KAISER STEEL CORPORATION, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST OF CITATION PROCEEDING DOCKET NO. WEST 80-494-R Citation No. 827208; 9/23/80 DOCKET NO. CENT 81-26-R Citation No. 827236; 9/24/80 MINE: York Canyon Mine No. 1

DECISION

APPEARANCES:

David B. Reeves, Esq., Kaiser Steel Corporation
P.O. Box 217, Fontana, California
For the Contestant,

Robert Cohen, Esq., Office of the Solicitor
United States Department of Labor, 4015 Wilson Boulevard
Arlington, Virginia 22203
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF PROCEEDINGS

Pursuant to section 105(d)[1]/ of the Federal Mine Safety and Health

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1/ Section 105(d) provides as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter referred to as "the Act"), the contestant filed two separate Notices of Contest challenging the validity of two citations issued at two different mine sites.

The contestant's motion to consolidate these two cases and expedite the proceedings was granted and a hearing on both cases was held in Raton, New Mexico, on December 17, 1980.

CENT 81-26-R

STIPULATIONS

At the outset of the hearing, the parties stipulated as follows:

1. The West York Strip mine produces 800,000 tons of coal a year.

2. The products produced at the mines enter into and affect interstate commerce.

3. That the said mine is under the jurisdiction of the Federal Mine Safety and Health Act of 1977.

ISSUES

1. Whether the Contestant violated safety standard 30 C.F.R. § 77.404(a) by operating a pickup truck after it was determined that said truck was in an unsafe condition?

2. Whether the alleged violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

FINDINGS OF FACT

1. Contestant operates a strip coal mine in the State of New Mexico designated as the West York Strip Mine.

2. Daniel R. Martinez, safety inspector for the Mine Safety and Health Administration, issued a citation to the contestant on September 23, 1980, for a violation of 77.404(a) as the result of an inspection of a motor vehicle.

3. The inspection of the motor vehicle was prompted by a statement of a representative of the miners that said vehicle was in an unsafe condition (Tr. 10).

4. The motor vehicle inspected was a light blue pickup truck, license number CG-7344 usually operated by Michael Stairwalt, assistant superintendent of strip operations during the day shift. The vehicle was also driven by Rocky Sanchez on the second shift and Manuel D. Romero on the third shift.

5. A bent steering stabilizing bar was observed on the pickup truck by the mine inspector.

6. During a test drive of the truck, the steering wheel and truck would vibrate at a speed of 25 miles per hour (Tr. 14). The "shaking" of the vehicle increased as the speed was increased (Tr. 15).

7. The mine inspector issued a 104(d)(1) citation removing the motor vehicle from service until it was repaired. The violation was abated on September 26, 1980 after the stabilizing bar was replaced (Tr. 21 and Exhibit 1).

8. The condition cited herein was classified by the inspector as "significant and substantial."

DISCUSSION

Citation number 827236[2]/ charges the contestant violated mandatory safety standard 77.404(a). The standard provides that:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Further, the inspector issued the above citation pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 which provides as follows:

caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The contestant in its Notice of Contest alleged, inter alia, (1) that no violation of the cited mandatory standard existed to support the issuance of the citation; (2) that the citation was improper since the alleged violation was not "caused by unwarrantable failure" of contestant to comply with the cited standard or any other mandatory health or safety standard; and (3) that the conditions set forth in the citation were not "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." An answer was filed by the Mine Safety and Health Administration (MSHA) on October 29, 1980.

The facts in this case, as developed through the testimony of the witnesses, do not support the contestant's position regarding the violation of the standard. It was uncontroverted that the pickup truck cited herein would "vibrate and shimmy" at speeds over 25 miles per hour. The testimony of Mike Stairwalt, contestant's assistant superintendent of Strip Operations, who operated this vehicle on his shift, testified that the pickup had a bent stabilizer on the front and that the part was on order (Tr. 38). During the test drive, Stairwalt was driving the pickup accompanied by the mine inspector and testified that the vehicle started to "shake" around 27 and 28 miles per hour. He then stated as follows: "I slowed it down and got it back under control and drove it back up and turned it around and came back down, and the second time it started to shimmy was probably 45 miles per hour" (Tr. 39).

The question here is whether this pickup continued to be used and driven by the miners after it developed the unsafe condition referred to in safety standard 77.404(a). The bent stabilizing bar, as part of the steering mechanism of this pickup truck, caused it to vibrate and shake at speeds over 25 miles per hour. This had the potential of causing the driver to loose control of the vehicle and either collide with other vehicles or roll over. Either occurrence would endanger the health and safety of the driver or other miners in the area. This obviously was an unsafe condition, and the standard requires that the equipment be removed from service.

The contestant argues that the condition is not different from other mechanical defects of vehicles, such as broken head lights, faulty windshield wipers, etc. I find a distinct difference between these items and the more essential parts of a vehicle such as brakes and the steering mechanism involved herein.

The subject 104(d)(1) citation contains the allegation that the cited condition was caused by the contestant's unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 77.404(a). A violation of a mandatory health or safety standard is caused by an unwarrantable failure to comply where "the operator involved has failed to abate the condition or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care" Zeigler Coal Company, 7 IBMA 280, 295-296, 84I. D-127, I BNA MSHC 1518, 1977-1978 CCH OSHD par. 21, 676 (1977). The findings of fact as set forth in this decision clearly show that the contestant, through its' employees, knew of the damaged part on the cited pickup truck and failed to abate this violative condition by removing said truck from service. Accordingly, it is found that the violation was caused by the contestant's unwarrantable failure to comply with mandatory safety standard 30 C.F.R. § 77.404(a).

The citation contains the allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In National Gypsum Company, 3 FMSHRC 822, 2 BNA MSHC 1201, 1981 CCH OSHD par 25, 294 (1981), the Review Commission held "that a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 3 FMSHRC at 825. Additionally, the Review Commission stated that "[a]lthough the [1977 Mine Act] does not define the key terms 'hazard' or 'significantly and substantially,' in this context we understand the word 'hazard' to denote a measure of danger to safety or health, and that a violation 'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." 3 FMSHRC at 827. (Footnote omitted).

The particular facts surrounding the violation involved herein reveal that the condition of the steering mechanism on the pickup truck could have been a major cause of a serious accident with a reasonable likelihood that it would result in an injury of a reasonably serious nature. Accordingly, I conclude that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

Accordingly, IT IS ORDERED that the contestant's contest in Docket No. CENT 81-26-R be, and hereby is DENIED, and that Citation no. 827236 be, and hereby is AFFIRMED.

WEST 80-494-R

This proceeding was initiated by the contestant filing a Notice of Contest pursuant to section 105(d) of the Federal Mine Safety and Health

Act of 1977, 30 U.S.C. § 801 et seq. (1978)[3]/ to contest the issuance of Citation No. 827208, dated September 23, 1980. The citation alleged that the contestant failed to follow its approved roof control plan in violation of 30 C.F.R. 75.200. Specifically, it alleged that miners were allowed to proceed a distance of 12 feet beyond permanent support and under temporary supports. [4]/

STIPULATIONS

The parties stipulated that the contestant's York Canyon No. 1 Mine is a large, underground, coal mine and is under the jurisdiction of the Federal Mine Safety and Health Act of 1977 (Tr. 68). Also, stipulated to and received into evidence were the following Exhibits:

Government Exhibit No. 1: Citation No. 827208, Modification, and Abatement
Government Exhibit No. 2: Roof Control Plan
Government Exhibit No. 3: Drawing of Entry 1 and 2, ten left section.
Contestant Exhibit No. 1: Drawing of Entry No. 1 and 2, ten left section
Contestant Exhibit No. 2: Inspectors notes and drawing of area.

FINDINGS OF FACT, DISCUSSION AND CONCLUSION

The question of whether or not there was a violation of 30 C.F.R. 75.200 centers around an interpretation of this section of the Act and several provisions of the contestant's roof control plan. Section 75.200 provides as follows:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1980. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at

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3/ See footnote No. 1.

4/ Citation No. 827208 alleges the following:

The roof control plan was not been complied with in that miners (jack leg drillers) were allowed to proceed beyond the last permanent support for a distance of 12 feet under temporary supports to drill 5 - 6 foot holes and shot down 3 to 4 feet of top sandrock to allow for height in the No. 1 room in the 10 feet section, I.D. No. 008-0. This was conducted during the third shift.

for the purpose of testing the roof by the sound and vibration method and installing supports shall do so with caution and shall be within 5 feet (less if indicated on sketch Nos. D) of a temporary or permanent support. If hazardous conditions are detected, corrective action shall be taken to give adequate protection to the workmen in the area involved.

4. When installing permanent supports, temporary supports may be repositioned in the sequence indicated on the attached sketch (Nos. C). However, if it is necessary to remove temporary supports (other than those specified above) before permanent supports are installed, such temporary supports shall be removed by some remote means, or another temporary support shall be installed in such a manner that the workman removing the support remains in a supported area. Means of removal of such supports shall be approved by the District Manager.

5. Work such as extending line curtains, other ventilating devices or making methane tests inby the roof bolts shall not be done unless a minimum or two temporary supports are installed. This minimum is applicable only if they are within 5 feet of the face or rib and the work is done between such supports and the nearest face or rib. Other methods of providing temporary supports for this work will be accepted if equivalent protection is provided.

6. Where rehabilitation work is being done, the following temporary support pattern shall apply:

a. Where bolts are being replaced in isolated instances (such as where equipment has knocked bolts loose) one temporary support shall be installed within a radius of 4 feet from each bolt to be replaced.

b. Where crossbars or roof bolts are being installed in an area where roof failure is indicated, a minimum of two rows of temporary supports shall be installed on not more than 5 foot centers across the place so that the work in progress is done between the installed temporary supports and adequate permanent supports in sound roof.

7. (a) Where loose material is being taken down, a minimum of two temporary supports on not more than 5 foot centers shall be installed between the miner and the material being taken down unless such work can be done from an area supported adequately by permanent roof supports. (Emphasis added).

Section 75.200 requires a mine operator to adopt and maintain a roof control plan suitable for its mine and it is well settled that any violation of the approved plan is a violation of Section 75.200, Peabody Coal Company,8 IBMA 121 (1977) and Affinity Mining Company, 6 IBMA 100 (1976).

Citation No. 827208 contains a description by the inspector of what condition or practice he considered caused a violation of Section 75.200. It states in part: "The roof control plan was not complied with in that miners (Jack leg drillers) were allowed to proceed beyond the last permanent support for a distance of 12 feet under temporary supports to drill ..." (Government's Exhibit No. 1). A further understanding of the inspector's interpretation of how the roof control plan was violated is provided in a review of the following transcript colloquy at pages 120, 121, and 122:

> Mr. Reeves (Contestant's counsel): Mr. Duran, did you issue the citation because you believed the roof control plan was not being complied with?
>
> Mr. Duran (MSHA inspector): Yes.
>
> Mr. Reeves: Was the company violating a specific section?
>
> Mr. Duran: 75.200.
>
> Mr. Reeves: Was the company violating a specific section of its roof control plan?
>
> Mr. Duran: Yes.
>
> Mr. Reeves: What section is that?
>
> Mr. Duran: That is Page 7, Item C.
>
> Mr. Reeves: Item C at the top?
>
> Mr. Duran: Yes.
>
> Mr. Reeves: Was that the only section that was violated?
>
> Mr. Duran: Yes.
>
> Mr. Reeves: If that section had not been violated, you would not have issued a citation, is that correct?
>
> Mr. Duran: I didn't quite get that question.
>
> Mr. Reeves: If that Section C on Page 7 had not been violated, then you would have not issued a citation; is that correct?
>
> Mr. Duran: I might have not.
>
> Mr. Reeves: Is it your testimony, that you issued the citation because you believed the company was in violation of Section C on Page 7?
>
> Mr. Duran: Yes.

Mr. Reeves: Is it your testimony that you believed the company was in violation of any other section?

Mr. Duran: No, only to allow people to go in by the last permanent support.

Mr. Reeves: Well, you issued the citation because you believed the company was in violation of its roof control plan?

Mr. Duran: Yes.

Mr. Reeves: And is it correct, that the only section you believed the company violated was Section C, which is found on Page 7?

Mr. Duran: Yes.

Mr. Reeves: I would like you to examine Section C on Page 7 and tell us how the company violated that section?

Mr. Duran: "Only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports."

Mr. Reeves: Does your copy have a period there, or does it go on?

Mr. Duran: No, it don't.

Mr. Reeves: It continues on to say "until temporary supports are installed."

Mr. Duran: Until temporary supports are installed.

Mr. Reeves: What about the second section, did the company violate that?

Mr. Duran: I do not know that.

Mr. Reeves: And the third sentence, did the company violate that?

Mr. Duran: I cannot answer because I didn't observe that.

Mr. Reeves: And the fourth sentence, did the company violate that?

Mr. Duran: We are talking about No. 4.

Mr. Reeves: The fourth sentence of Paragraph C on Page 7?

Mr. Duran: I cannot answer that either because I don't know they would have found hazardous conditions.

Mr. Reeves: I would like to direct your attention to Sketch A. Did the company violate Sketch A in some fashion?

Mr. Duran: Yes, they did.

Mr. Reeves: And the provisions of Sketch A, did they violate that?

Mr. Duran: The last permanent support was over four foot as required of the working face.

Mr. Reeves: What particular sentence are you referring to?

Mr. Duran: I'm referring to the maximum distance from the last roof bolts to the face shall equal four feet before continuous mining starts.

Mr. Reeves: Wasn't the last permanent support within four feet of the face before the continuous mining started?

Mr. Duran: I cannot answer that, because I didn't observe the mining cycle.

Mr. Reeves: Do you know that it wasn't?

Mr. Duran: No, I don't.

Mr. Reeves: So you can't say the company violated that?

Mr. Duran: No, sir.

Mr. Reeves: When is the loading cycle completed?

Mr. Duran: In this particular condition, I would say when the loading cycle is completed is when the rock is cleaned up.

Mr. Reeves: And you saw the rock hadn't been cleaned up?

Mr. Duran: No, sir.

Mr. Reeves: Would you say the loading cycle had not been completed?

Mr. Duran: In this particular condition, I would say, yes.

Mr. Reeves: Did the company violate Sketch B in any way?

Mr. Duran: I would say, no.

Mr. Reeves: Did the company violate Sketch C in any way?

Mr. Duran: I would say, yes.

Mr. Reeves: And a particular provision was violated?

Mr. Duran: In that only three temporary jacks were used.

Mr. Reeves: Do you know how many were used?

Mr. Duran: No, I don't.

Mr. Reeves: So maybe more than three were used; is that correct?

Mr. Duran: That is possible.

Mr. Reeves: So you don't know how many were used?

Mr. Duran: I only seen two, and I won't say they were not there. They were thrown over by the miner if they did use temporary supports there was only two that I could observe at the time of the citation.

Mr. Reeves: Is that why you wrote the citation, because you believe only two temporary jacks were used?

Mr. Duran: No, I wrote the violation because people were allowed to go in by the last permanent support under the temporary support.

Much of the trial time in this case involved questioning the inspector as to his interpretation of how the roof control plan and Section 75.200 was violated. The sole issue appears to be that miners were allowed to go in by the last permanent support to advance the working face under temporary supports (Tr. 97 and 126).

In earlier testimony, the inspector indicated that it was usual practice for the miner's helper to go beyond the permanent roof support, and under temporary supports to hold the end of the drill bit near the face (Tr. 101). Also, testimony was given that the "fire boss" was permitted to go to the entry and check for methane under temporary support. At the conclusion of the Secretary's case he argues that, although the plan does not specifically address this particular situation, it is obvious from tradition and from the inferences drawn from the plan itself, that this type of activity is prohibited (Tr. 150).

If, as the Secretary argues, the Contestant's roof control plan or Section 75.200 does not address this particular situation, and the Secretary is relying on "tradition" or "inference" then an ambiguity exists here. In a similar case where the documents resulted in an absolute ambiguity in the points which were the crux of the case, it was determined that MSHA has a duty to immediately make an effort to clarify the plan so that no question exists in the future as to what is required for the safety of the miners. Secretary of Labor v. Penn Allegh Coal Company, Inc., Docket No. PITT 79-190-P; (February 28, 1979), 1 MSHC 2028.

The roof control plan and Section 75.200 both provide that only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports until temporary supports are installed. After careful review of this approved roof control plan, I am persuaded that there are no specific restrictions that would notify the contestant that the activity described in the citation in this case was either a violation of the plan or Section 75.200.

At the conclusion of the presentation of the Secretary's case, Contestant moved for a summary judgment on the grounds that the Secretary had not established a prima facie case in that the Secretary failed to prove that the Contestant did not follow the approved roof control plan and violated Section 30 C.F.R. 75.200.

At the hearing, I granted the Contestant's Motion and ordered that Citation No. 827208 be vacated. That bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that the Citation is VACATED and the case DISMISSED.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 29 1981

NICHOLAS RAMIREZ,	:	Complaint of Discharge,
Complainant	:	Discrimination or Interference
v.	:	
	:	Docket No. WEVA 81-248-D
W-P COAL COMPANY,	:	
Respondent	:	No. 21 Mine

DECISION

Appearances: Larry Harless, Esq., Charleston, West Virginia, on behalf of Complainant;
Harold S. Albertson, Esq., Hall, Albertson and Jones, Charleston, West Virginia, on behalf of Respondent.

Before: Judge Stewart

I. Procedural Background

This is a discrimination or interference proceeding arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the Act).

Nicholas Ramirez (Complainant) alleges that W-P Coal Company (Respondent) committed acts of discrimination or interference in violation of section 105(c)(1) of the Act. The complaint was filed before the Federal Mine Safety and Health Review Commission (Commission) pursuant to section 105(c)(3) of the Act following the Complainant's receipt of a written notification of the Secretary of Labor's determination that no violation of section 105(c)(1) occurred. 1/

1/ The Complainant, acting pro se, filed various documents between January 28, 1981, and March 16, 1981, which collectively constitute the complaint of discrimination or interference. All documents, except the one filed on January 28, 1981, were filed in response to various orders to show cause issued by Chief Administrative Law Judge James A. Broderick. The Respondent's answer was filed on April 3, 1981.

It is undisputed that the Complainant was not suspended or discharged by the Respondent (see, e.g., Tr. 67). The claim, as set forth in the various documents constituting the complaint, is one of discrimination or interference not entailing suspension or discharge.

The hearing in this matter was held on June 17, 1981, in Charleston, West Virginia, with representatives of both parties present and participating. The Complainant called three witnesses: Nicholas Ramirez, Charles Blankenship, and Thomas Marcum. The Respondent called one witness, Kenneth Cooper. Both parties submitted posthearing briefs.

II. Findings of Fact and Conclusions of Law

The Complainant has been employed as a roof bolter at the Respondent's No. 21 Mine for over 4-1/2 years.

When the Complainant arrived on the Second South Section on November 5, 1980, he was directed by one of his supervisors, William Meade, to drill test

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fn. 1 (continued)

One of the documents which is part of the complaint is a copy of a February 2, 1981, letter from the Complainant to the Respondent addressed to the attention of Mr. Joe Bragg, foreman; Mr. Ray Herndon, superintendent; and Mr. Kenneth Cooper, general manager. The letter advises the Respondent of the Complainant's disagreement with the Secretary of Labor's determination that no violation of section 105(c) occurred, and states that the Complainant has "requested that the [Commission] review my case." The letter further states that "I have filed this complaint because of your (Mr. Cooper's) decision to have me discharged because of my opinion (requested by MSHA Mine Inspector) on roof conditions on my section."

Another document which is part of the complaint is a February 23, 1981, letter from the Complainant to the Commission which states, in part, as follows:

"The company more or less requested that I keep quiet on safety or loose [sic] my job. I feel that I was wronged in picking me as a guinny [sic] pig to show the other men (union members) what could happen to them if they spoke up on safety problems.

"I was not the person who requested the safety inspection. but I was the one who they threatened to punish for it. If these practi
continue, I fear not only for the safety of myself but fo
who will be reluctant to report safety violation

Another document which is part of the comp
statement by the Complainant setting forth a de
facts upon which the claim of discrimination o
the statement, the Complainant maintains tha
[also] for my fellow workmen who must work u
for reporting safety violations."

As to the relief requested, the February 23, 1981, letter requested "$20,000 in damages for myself and my family stemming from the pressures put on us by the company (W-P Coal Co.)." The posthearing brief filed by the Complainant, acting through counsel, requests that the "complaint be upheld; that the company be required to post appropriate notices; that reasonable attorney fees and other costs incident to this matter be awarded; and that Your Honor grant such other and further relief as seems proper and just."

holes in the Nos. 1 and 2 Entries. The test drilling confirmed reports that the roof therein was bad. Mr. Meade then directed the Complainant to bolt No. 3 Entry at 3 Left Break. Upon entering that area, the Complainant observed a board lying in the break which read "needs six foot bolts." After the Complainant drilled test holes in the No. 3 Entry, he discovered that the roof had broken at 5 feet and conveyed this information to Mr. Meade. Mr. Meade ordered the Complainant to proceed elsewhere.

Before the Complainant left the area, Joe Bragg, the assistant mine foreman, ordered him to drill yet another test hole. Mr. Bragg then ordered the Complainant to bolt the area with 30-inch bolts. The Complainant questioned Mr. Bragg's decision, pointing out that the roof was broken, but Mr. Bragg responded "we'll take care of it later on." The Complainant performed the work as ordered until Mr. Meade returned and ordered the Complainant to work elsewhere.

Federal mine inspector Thomas Marcum conducted a regular inspection at the Respondent's No. 21 Mine on November 5, 1980. While conducting this inspection, he was informed, during a telephone conversation with his supervisor, of a complaint that had been made during the earlier shift concerning the roof conditions in the Nos. 1 and 2 Entries on Second South Section. He proceeded to the Second South Section accompanied by Charles Blankenship, the chairman of the local UMWA safety committee and an employee of the Respondent, Mr. Hawkins, the Respondent's safety representative, and Ray Herndon, the superintendent of the Respondent's property in West Virginia. After a number of test holes were drilled in the roof and it was confirmed that the roof in the two entries had broken, the inspection party discussed the alternative methods for supporting the roof. Inspector Marcum, Mr. Blankenship, and management ultimately agreed that the use of straps, headers, legs, and pins would be appropriate. After this agreement had been reached, Inspector Marcum asked the Complainant for his opinion. The Complainant replied that he did not think that the methods proposed would be safe. As a consequence, Inspector Marcum decided to call in a Mine Safety and Health Administration (MSHA) roof-control specialist and obtain his opinion. Management agreed, dangered off the Nos. 1 and 2 Entries and directed that work continue only on the left side of the mine.

Before the inspector left, the Complainant informed him of the conditions in the No. 3 Entry at 3 Left Break, including Mr. Bragg's instruction that 30-inch roof bolts be used. Inspector Marcum thereafter told Mr. Bragg that he wished to speak with him outside.

If the roof conditions were discussed by Inspector Marcum and mine management either on the way out of the mine or upon reaching the surface, they did so casually. Inspector Marcum, Mr. Blankenship, Mr. Hawkins, Mr. Herndon, and Mr. Kenneth Cooper gathered in the trailer which served as the mine office. Kenneth Cooper was the general manager of the Respondent's property in West Virginia. Inspector Marcum, Mr. Blankenship, and Mr. Hawkins were in one office, either filling out forms or eating lunch. Messrs. Herndon and Cooper went into the adjoining office, closing the door

behind them. These two remained in that office for approximately 5 to 10 minutes. Inspector Marcum testified that some loud talking went on in Mr. Cooper's office, but that he did not recall anything that was said.

After Mr. Herndon left Mr. Cooper's office, and while Mr. Blankenship sat approximately 3 to 5 feet from the door eating his lunch, Mr. Blankenship overheard Mr. Cooper make a telephone call and ask for Cleve Campbell, Director of Public Relations for Picketts and Mathes Company. Mr. Blankenship heard Mr. Cooper say that "one man has the whole operation shut down up here" and asked if he had grounds to discharge him. Mr. Blankenship, who testified that Mr. Cooper talked on the telephone in a "hollering manner," believed that Kenneth Cooper intended for him to overhear the conversation.

Mr. Cooper testified that he called Cleve Campbell because he felt that management "had exercised every option." Mr. Cooper knew Mr. Blankenship was in the adjoining office but the telephone call was not staged for Mr. Blankenship's benefit. Although Mr. Blankenship testified that the office door was open, the testimony of Mr. Cooper and that of the disinterested witness Inspector Marcum that the door was closed is more persuasive. However, notwithstanding the fact that the office door was closed, Mr. Cooper testified that he has no doubt that Mr. Blankenship overheard the conversation because the office door was thin.

Mr. Cooper called Mr. Campbell because he believed that the Complainant had caused a drop in production. Mr. Campbell told Mr. Cooper to get the facts, weigh them and make a decision. When the shift ended, Mr. Cooper asked his foremen whether they had directed the Complainant to pin the affected area and was told that they had not. Because the Complainant had not disobeyed orders, Mr. Cooper felt that he did not have grounds to suspend him with intent to discharge. Mr. Cooper testified that "that was the end of it." 2/

When the shift concluded, the Complainant found Mr. Bragg waiting for him in the parking lot. Mr. Bragg asked the Complainant what he had told Inspector Marcum. The Complainant responded that he had told Inspector Marcum what Mr. Bragg had ordered him to do. Mr. Bragg then accused the Complainant of lying. The Complainant responded that he would not lie for Mr. Bragg to keep Mr. Bragg out of trouble because Mr. Bragg knew that what he did was wrong.

2/ There is some uncertainty in the record as to whether Mr. Cooper received accurate information when the inspection party returned to the surface. The Complainant had informed Inspector Marcum that Mr. Bragg had instructed him to install 30-inch roof bolts in the No. 3 Entry at 3 Left Break. However, Mr. Cooper may have been told, or he may have concluded from what he was told, that the Complainant had been ordered to bolt the roof in the Nos. 1 and 2 Entries. However, it is clear that the Complainant was never ordered to install roof bolts in the Nos. 1 and 2 Entries.

Mr. Blankenship observed Joe Bragg and the Complainant in the parking lot. Mr. Blankenship testified that Mr. Bragg was "kind of yelling." However, Mr. Blankenship did not hear what was said. After Mr. Bragg left, Mr. Blankenship informed the Complainant of the telephone call and stated that he would contact Richard Cooper, the union safety representative, for assistance.

On the following day, an inspection party comprised of Inspector Marcum, Mr. Alitzer (Inspector Marcum's supervisor), Mr. J. C. Wharf (an MSHA roof-control specialist), Mr. Griffin (a state roof-control man), Richard Cooper, the Complainant, Clifford Tomlin (the Complainant's helper), Mr. Herndon, Mr. Meade, Mr. Bragg, and Mr. Blankenship returned to the Second South Section. Kenneth Cooper did not enter the mine. Earlier that morning, Kenneth Cooper was asked by Mr. Alitzer if somebody was "going to lose their job over this." Mr. Cooper responded to the question by asking Mr. Alitzer what he was referring to. Mr. Alitzer then said "We're here because we heard somebody was going to be discharged." Mr. Cooper stated that no one was to be discharged.

The inspection party observed the condition and discussed resolution of the problem. They agreed among themselves that the area should be supported with 5-foot roof bolts, and with "headers and legs." 3/ This conclusion was the same as that reached on November 5. The miners working in the area were called together and asked if they thought this would be safe. No one responded. Mr. Wharf then asked the Complainant what he thought of this method of supporting the roof. The Complainant responded with the following statement: "Well, I heard the company was trying to fire me yesterday for what I had suggested or the statement that I had made and I don't want to say anything about it today."

One week later, Ray Herndon approached the Complainant while the Complainant and his helper, Clifford Tomlin, were putting up headers and were roof bolting. There were four or five other union men in the area helping to put up the headers. Mr. Herndon watched the work for a while and then asked the Complainant who had told him that the company was trying to fire him. The Complainant "didn't say anything." Mr. Meade, who was present at the time, said, "Well, I guess he don't want to tell you Ray; he's not saying anything." The Complainant replied, "No, I don't." Herndon then said, "Well, there must be something wrong with you." The Complainant replied, "No, Ray. There's not. What's wrong up here is bad management; you've got bad management up here." Mr. Herndon "got kind of mad at that." The Complainant "just went about his job and started to bolt the headers." Mr. Herndon ordered Clifford Tomlin to shut the machine off, but the Complainant turned the machine off before Tomlin could do so. Mr. Herndon told the Complainant that, if the conditions were

3/ Mr. Blankenship testified that the Nos. 2 and 3 Entries were timbered off as a result of the November 6, 1980, inspection. He further testified that mining continued in the No. 1 Entry which was headered and timbered, and that "forty-some inch" pins were used to bolt the No. 1 Entry.

as bad as the Complainant thought, he should find employment somewhere else. Mr. Herndon stated that the Complainant was given his job through Pedro Mendez, a night foreman at the mine who was a distant relative of the Complainant. The Complainant interpreted the statement as implying that he was somehow indebted to the company for hiring him, and he responded by stating, "Well, what does that mean, Ray, am I supposed to kiss your butt or something for it * * *." When Mr. Herndon attempted to continue arguing, the Complainant did not say anything in response because he felt that Mr. Herndon was trying to "start something up." This opinion as to Mr. Herndon's motive stemmed from the Complainant's belief that the Respondent was attempting to discharge him. The Complainant finished his shift.

Mr. Herndon reported this incident to Mr. Cooper. He stated that he had gone to the Complainant because he "want[ed] things to be different" but when he attempted to talk with the Complainant, the latter began cursing and said that he was not a fit mine manager; that the Complainant had called Mr. Herndon a liar in the presence of other miners but, when questioned, had failed to identify the occasions on which Mr. Herndon had lied. Mr. Herndon also told Mr. Cooper that he wanted to bring suit against the Complainant because he felt that the statements jeopardized his job. Mr. Cooper advised Mr. Herndon to simply forget the incident.

Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish illegal discrimination or interference within the meaning of section 105(c)(1) of the Act, the Complainant must prove by a preponderance of the evidence: (1) that he engaged in protected activity, and (2) that an adverse action was taken against him which was motivated in

any part by the protected activity. Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001, 1980 CCH OSHD par. 24,878 (1980), rev'd. on other grounds sub nom. Consolidation Coal Company v. Marshall, No. 80-2600 (3rd Cir., filed October 30, 1981); Secretary of Labor ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803, 2 BNA MSHC 1213, 1981 CCH OSHD par. 25,287 (1981); Secretary of Labor ex rel. Johnny N. Chacon v. Phelps Dodge Corporation, No. WEST 79-349-DM (FMSHRC, filed November 13, 1981).

The Complainant maintains in his posthearing brief that he engaged in protected activity on November 5, 1980, when he voiced his disagreement with the decision reached by Inspector Marcum and the other members of the inspection party regarding correction of the roof problems in the Nos. 1 and 2 Entries. The Complainant argues that the Respondent's management employees reacted to such protected activity in such a fashion as to discriminate against him and interfere with the exercise of his statutory rights under the Act; and that such unlawful discrimination or interference can reasonably be expected to have a chilling effect on the exercise of statutory rights by other miners in that they will be deterred either from reporting safety violations or from expressing their concerns over safety matters.

The initial question presented is whether the Complainant engaged in protected activity on November 5, 1980. The evidence establishes three separate instances of protected activity occurring on that day. The first instance of protected activity occurred when the Complainant questioned Mr. Bragg's decision to use 30-inch roof bolts in the No. 3 Entry of the Second South Section. The second instance occurred when the Complainant voiced his disagreement with the decision reached by Inspector Marcum and the other members of the inspection party regarding the roof problems in the Nos. 1 and 2 Entries. In challenging the proposed solution, the Complainant engaged in protected activity. 4/ The third instance of protected activity occurred when the Complainant informed Inspector Marcum of the roof conditions in the No. 3 Entry and of Mr. Bragg's instructions to use 30-inch roof bolts there.

The second question presented is whether the Respondent either discriminated against the Complainant or otherwise interfered with the exercise of the Complainant's statutory rights. The burden is upon the Complainant to prove by a preponderance of the evidence that the Respondent took adverse action against him and that such action was motivated in any part by the Complainant's participation in protected activity.

It is undisputed that the Respondent neither suspended nor discharged the Complainant. Instead, the Complainant argues that adverse action was

4/ This is the sole incident of protected activity expressly relied upon by the Complainant in his posthearing brief as forming the basis for the claim of discrimination or interference.

taken against him in that he was the "recipient of a series of threats or verbal reprisals merely because he gave an honest answer to a directed question by a federal safety inspector" (Complainant's Posthearing Brief, p. 1). The so-called series of threats or verbal reprisals which allegedly constitute the adverse action taken against the Complainant allegedly occurred when the Respondent's agents allegedly (1) berated the Complainant, (2) threatened him with the loss of his job through his safety committeeman, and (3) impliedly threatened him with the loss of his job on November 12, 1980, because he had participated in a Federal mine safety inspection. For the reasons set forth below, I conclude that no threats or verbal reprisals were directed against the Complainant in retaliation for his having engaged in protected activities.

The incident in which the Respondent's agent allegedly berated the Complainant occurred at the end of the November 5, 1980, day shift when Mr. Bragg, the assistant mine foreman, confronted the Complainant on the parking lot (Complainant's Posthearing Brief, p. 2). The relevant facts and circumstances surrounding the incident show that the Complainant was never ordered to bolt the roof in the Nos. 1 and 2 Entries. However, early in the day shift on November 5, 1980, Mr. Bragg ordered the Complainant to perform roof bolting in the No. 3 Entry at 3 Left Break. Mr. Bragg ordered the Complainant to use 30-inch roof bolts despite the fact that the roof was broken at a depth of approximately 5 feet. The Complainant questioned Mr. Bragg's decision, but performed the work as ordered until told by Mr. Meade to work elsewhere.

Later that shift, during the inspection of the Second South Section, the Complainant informed Inspector Marcum of the conditions in the No. 3 Entry at 3 Left Break and of Mr. Bragg's instruction to use 30-inch roof bolts. The Complainant subsequently overheard Inspector Marcum tell Mr. Bragg that he wanted to talk to him outside.

After the November 5, 1980, day shift, Mr. Bragg confronted the Complainant on the parking lot. He asked the Complainant what he had said to Inspector Marcum and accused the Complainant of lying to the inspector. Mr. Bragg left after the Complainant responded forcefully.

The Complainant has failed to prove either that this confrontation amounted to adverse action or that it was motivated in any part by the Complainant's participation in protected activity. First, the Complainant's characterization of the parking lot episode is palpably inaccurate. The Complainant argues that the confrontation on the parking lot addressed the incident in which he voiced his disagreement with the decision reached by Inspector Marcum and the other members of the inspection party regarding correction of the roof problems in the Nos. 1 and 2 Entries. In his posthearing brief (p. 2), Complainant states:

> Surely the accusation of a supervisor to an employee that the latter is "lying" about his participation in a safety inspection, when all the employee did was to voice his solicited, unenforceable opinion to a government safety

inspector, constitutes a clear violation of the Act and undermines its effective enforcement.

The record clearly discloses that Mr. Bragg was not motivated by such considerations. Additionally, it should be noted that during the confrontation neither the Complainant nor Mr. Bragg addressed the incident of protected activity which the Complainant relies upon in his posthearing brief as forming the basis for the claim of unlawful discrimination or interference.

Second, Mr. Bragg did not challenge the Complainant for his having spoken with Inspector Marcum concerning the situation in the No. 3 Entry at 3 Left Break. Rather, he disputed only the accuracy of that communication and the truthfulness of the Complainant. 5/ The Complainant did not establish that Mr. Bragg attempted to intimidate or threaten the Complainant in any manner. In fact, the record indicates that Mr. Bragg walked away from the Complainant and did not raise the matter again. To put things in complete perspective, note should be taken of the inflamatory statements made by the Complainant to Mr. Herndon on November 12, 1980, in which the Complainant vilified Mr. Herndon in the presence of other miners, cursing and berating him, and calling him a liar and an unfit mine manager.

In view of the foregoing, the Complainant's assertion that Mr. Bragg's action amounted to a violation of section 105(c)(1) of the Act is rejected.

The Complainant also argues that one of the Respondent's agents employed Mr. Blankenship, the union safety committeeman, as a conduit to threaten the Complainant with the loss of his job. The Complainant is referring to the November 5, 1980, telephone call placed by Mr. Kenneth Cooper to Mr. Cleve Campbell from the trailer which served as the mine office, a telephone call which concerned the possibility of discharging the Complainant. The Complainant maintains that Mr. Cooper either staged the telephone call exclusively for Mr. Blankenship's benefit or at least intended for Mr. Blankenship to overhear the call, and, accordingly, argues that Mr. Cooper relied upon Mr. Blankenship to unwittingly act as a company agent by relaying the threat to the Complainant.

The specific facts surrounding the alleged threat show that during the course of the November 5, 1980, inspection of the Second South Section, mine management, Inspector Marcum, and the union safety representative reached a conclusion as to the proper method of supporting the bad roof in the Nos. 1 and 2 Entries. When Inspector Marcum questioned the Complainant, he objected to the methods agreed upon by the others. As a result, the inspector and management agreed to danger off the area and to postpone final decision as to the proper methods for support until the following day when the opinion of a roof-control expert could be obtained. Work was to continue in another area of the mine.

5/ See footnote 2, supra.

After this decision had been reached, members of the inspection party proceeded to the mine office. Mr. Ray Herndon went into Mr. Kenneth Cooper's office, closing the door after himself. Inspector Marcum, Mr. Hawkins, and Mr. Blankenship remained in the adjoining office. After a few minutes, Mr. Herndon left Mr. Cooper's office, and Mr. Cooper then placed a phone call to Cleve Campbell. Mr. Cooper was aware that Mr. Blankenship and Inspector Marcum were in the adjoining office and that the conversation might be overheard by them. Although the door to the office was closed, the construction of the trailer which housed the offices was such that Mr. Blankenship did overhear the conversation. Although Inspector Marcum was in the room with Mr. Blankenship, he did not know that Mr. Cooper was talking on the telephone and he did not overhear what was said.

Mr. Cooper told Mr. Campbell of the earlier safety complaint filed with MSHA by some unknown individual concerning the roof conditions in the Nos. 1 and 2 Entries of Second South Section, 6/ of the subsequent inspection of the two entries, and of the concurrence of all but the Complainant as to the proper method of roof support. Mr. Cooper asked if he had grounds to discharge the Complainant. Mr. Campbell responded by asking whether the Complainant had disobeyed direct orders, and he advised Mr. Cooper to gather and weigh the facts and to thereafter make a decision. At the end of the shift, Mr. Cooper questioned his foremen and found that the Complainant had not disobeyed a direct order to work. He therefore dropped the matter. 7/

As noted above, the gist of Complainant's position here is that Mr. Cooper intended Mr. Blankenship to overhear his conversation with Mr. Campbell, to comprehend it as a threat and to relay the threat to the Complainant. According to the Complainant, Mr. Cooper intended the Complainant to be influenced thereby to drop his objections to the method proposed for supporting the roof in the Second South Section and hesitate to voice safety complaints in the future.

Mr. Cooper testified, and it is accepted herein, that he did not stage a demonstration for Mr. Blankenship's benefit. He had no intention of conveying a threat either to Mr. Blankenship or to the Complainant through the agency of Mr. Blankenship. The surrounding circumstances lend support to Mr. Cooper's assertion that he did not intend to threaten the Complainant. To begin with, Mr. Cooper knew that Inspector Marcum was also in the adjoining office and that he might overhear the telephone call. It is highly improbable that he would threaten a miner for safety-related activity in the hearing of a representative of the Secretary of Labor, the agency with principal responsibility for ensuring compliance with section

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6/ Mr. Cooper testified that he never discovered the identity of the individual who lodged the complaint with MSHA concerning the roof conditions in the Nos. 1 and 2 entries of Second South Section (Tr. 80-81). It appears that Mr. Cooper also discussed this unidentified individual with Mr. Campbell during their November 5, 1980, telephone conversation (see

7/ See footnote 2, supra.

Act. Furthermore, the testimony of both Mr. Cooper and Inspector Marcum establishes that the door between the offices was closed. That the door was closed further reduces the likelihood that Mr. Cooper intended to have Mr. Blankenship overhear his conversation.

In addition to the foregoing, the telephone conversation was limited to a discussion of the propriety of discharging the Complainant. Clearly, a decision to discharge had not been made. The question was raised as to whether grounds for discharge existed and the conversation concluded with the decision to seek more information.

Mr. Cooper's follow-up actions are also inconsistent with the theory that the conversation was a threat. When Mr. Cooper questioned the Complainant's supervisors and discovered that grounds for discharge did not exist, he dropped the matter.

Finally, it is noted that Mr. Herndon initiated his conversation with the Complainant on November 12, 1980, by asking who had told him that he was to be discharged for having voiced a safety complaint. Mr. Herndon left Mr. Cooper's office immediately prior to the telephone call to Mr. Campbell and was present on November 6 when the Complainant stated that he was to be discharged for his safety complaints. If it was the intent of mine management to have threatened the Complainant on November 5, it is likely that Mr. Herndon would have been aware of the threat. His posing the question to the Complainant on November 12, 1980, is inconsistent with his having had such knowledge.

In view of the foregoing, I conclude that Mr. Cooper did not make the telephone call for the purpose of having Mr. Blankenship overhear the telephone conversation and conveying it to the Complainant. I further conclude that in conducting the telephone call, Mr. Cooper neither threatened nor intended to threaten the Complainant, either directly or indirectly, with the loss of his job. Accordingly, the telephone conversation did not constitute discrimination or interference in violation of section 105(c)(1) of the Act.

The Complainant also maintains that an agent of the Respondent, Mr. Ray Herndon, impliedly threatened him with the loss of his job on November 12, 1980, because he had participated in a Federal mine safety inspection. The Complainant argues that one "perceive[s] the unmistakable hues of illegal reprisal" in this conversation.

The record shows that Mr. Herndon approached the Complainant in a conciliatory manner and attempted to discuss the Complainant's allegation that the company was trying to discharge him. The Complainant made little or no effort to accommodate Mr. Herndon. The testimony of both the Complainant and Mr. Cooper established that the Complainant was antagonistic in the presence of other miners to the point of cursing and berating Mr. Herndon, and calling him both a liar and an unfit mine manager. It is Complainant's contention that Mr. Herndon threatened him by suggesting "that, if the conditions were

as bad as [the Complainant] thought they were * * * maybe [the Complainant] should find employment somewhere else"; and by reminding him that he had obtained his job through a company supervisor who was also one of the Complainant's distant relatives. However, Mr. Herndon made these statements after the Complainant antagonistically stated that management at the mine was bad. Mr. Herndon reported to Mr. Cooper that the Complainant had specifically stated in the presence of other miners that Mr. Herndon was both a liar and an unfit mine manager. Mr. Herndon's statements are mild even taken out of context. When considered in context, they cannot be considered a threat or reprisal of any sort.

Additionally, a preponderance of the evidence does not support the position that the Respondent, acting through Mr. Herndon, discriminated against the Complainant or interfered with the exercise of his statutory rights when Mr. Herndon approached the Complainant and sought the identity of the individual who had informed him that the Respondent was trying to discharge him. As noted above, Mr. Herndon was aware of the November 5, 1980, telephone conversation between Mr. Kenneth Cooper and Mr. Cleve Campbell during which the latter directed the former to seek more information and to thereafter reach a decision respecting whether or not to discharge the Complainant. Mr. Cooper followed Mr. Campbell's instructions and concluded that grounds for the Complainant's discharge did not exist. The November 5, 1980, telephone call was intended to be a communication between or among members of the Respondent's management, and was not intended for dissemination outside mine management. Additionally, it appears that Mr. Cooper's further inquiries as to whether the Complainant had disobeyed orders were not intended for disclosure to anyone outside mine management.

Mr. Herndon approached the Complainant on November 12, 1980, because he "want[ed] things to be different," which has been construed to mean that he approached the Complainant in a conciliatory manner. This at least arguably implies that the question as to the informant's identity was directed toward ultimately reassuring the Complainant that the informant had been misinformed and that the Respondent was not trying to discharge him. It is also arguable that Mr. Herndon asked the question, at least in part, in order to determine the identity of the individual who had "leaked" confidential information.

In summary, I conclude that although the Complainant engaged in three instances of protected activity on November 5, 1980, he has failed to establish that the Respondent illegally discriminated against him or interfered with the exercise of his statutory rights in violation of section 105(c)(1) of the Act as a result of his having engaged in such protected activities. Accordingly, the complaint will be dismissed.

Proposed findings of fact and conclusions of law which are not expressly or impliedly adopted herein are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or becuase they are immaterial to the decision in this case.

ORDER

Accordingly, IT IS ORDERED that the above-captioned complaint be, and hereby is, DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 80-273
	:	Assessment Control No. 15-07295-03013
v.	:	
	:	Martiki Surface Mine
MARTIKI COAL CORPORATION, Respondent	:	

DECISION

Appearances: George Drumming, Jr., Esq., and Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
William G. Francis, Esq., Francis, Kazee and Francis, Prestonsburg, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 12, 1981, as amended April 30, 1981, July 15, 1981, and August 5, 1981, a hearing in the above-entitled proceeding was held on May 6, 1981, and October 7, 1981, in Prestonsburg, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decisions which are reproduced below. Two of the bench decisions are contained in the first volume of transcript and the third decision is contained in the second volume of transcript.

Citation No. 707702 1/8/80 § 71.603(c)(Tr. 48-52)

In order to rule on Mr. Francis' motion that Citation No. 707702 be dismissed for failure of the Government to prove that a violation of section 71.603(c) existed, I should make some findings of fact.

1. Inspector Dingess, on January 8th 1980, which was a Tuesday, examined the shop area belonging to Martiki Coal Corporation. At that time, he issued Citation No. 707702 stating that the drinking water fountain was not being maintained in a sanitary condition. He subsequently modified the citation by issuance of a subsequent action sheet on February 14, 1980, in which he changed the original section alleged to have been violated from section 71.602(c) to section 71.603(c).

2. There was introduced in evidence as Exhibits A and B two pictures which show that the water fountain was adjacent to a refrigerator. The inspector stated that the citation was primarily issued

on the ground that an excessive amount of dust, in his opinion, had been allowed to accumulate on the drinking cups which were hanging at the drinking fountain. The cups had been inverted and the dust was on the outside of the cups. The inspector also said that an excessive amount of dust was on the valve which is pressed to obtain water from the inverted container of water on top of the fountain. The inspector did not know how long it had been since the drinking fountain had been cleaned, but he pressed the valve and water did come out of the fountain. Therefore, the fountain was capable of being used. The inspector admitted that the refrigerator contained a supply of sanitary water containers in individual cups.

3. Respondent's witness, Justice, testified that he is the welding supervisor in the area adjacent to the location of the water fountain and refrigerator and he stated that the man who normally did the cleaning of the fountain had been off for a period of time and had been unable to clean the fountain, but that he had assigned other people to clean the bathrooms and the fountain from time to time. He was uncertain as to how long it had been since the cleaning person had become sick, but he testified that he believed that the fountain had been cleaned within a week prior to the inspector's writing of the citation and that in his opinion more dust would have been on the fountain than was there on the day the citation was written if the fountain had not been cleaned for 7 days.

I think those are the basic facts on which a decision will have to be based. The section at issue, namely, 71.603(c), reads as follows: "Drinking fountains from which water is dispensed shall be thoroughly cleaned once each week." The inspector definitely satisfied the first part of that provision in that he tested the drinking fountain and found that water could be dispensed through it, and while the respondent's evidence shows that some of the employees had been told to use the water in the refrigerator until the cleaning employee was able to resume his duties or until someone had been designated permanently to do his work in his absence, the fact remains that the water fountain could have been used by other employees who had not been advised to get their water from the refrigerator.

The difficulty I have with finding a violation, of course, is that the last part of section 71.603(c) provides that the fountain shall be thoroughly cleaned once each week. The inspector did not find out for certain that the fountain had not been cleaned within a week's time. The gap in his proof, therefore, as to whether the fountain had been cleaned for a week is filled in by Justice's testimony which indicated that in his opinion the fountain had been cleaned within a period of 1 week prior to the time the citation was written.

I am aware that the Commission has been very liberal in the interpretation of the standards. For example, in Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (1981), the Commission dealt with a citation which had alleged a violation of section 56.9-2, which provides that equipment defects affecting safety shall be corrected before the equipment is used. In that decision the Commission interpreted that

section to mean that use of a piece of equipment containing a defective component that could be used, and which if used, could affect safety, constitutes a violation of section 56.9-2. The Commission said that its interpretation of that section would come closer to requiring corrective action before an accident occurred than the broader interpretation which had been used by an administrative law judge. The Commission then made a very broad interpretation of that section by saying that if equipment with defects affecting safety is located in a normal work area fully capable of being operated, that constitutes use within the meaning of that section. So I am sure, based on what the Commission said in that case, by analogy the Commission would take a very broad interpretation of the section that's before me in this instance, but I don't see how I can ignore language stating that fountains "shall be thoroughly cleaned once each week."

Since I have the testimony of an inspector who is not certain that the fountain had been cleaned within a week's period and I have the opinion of the welding supervisor, who worked in the area, who says that it was cleaned in less time than a week prior to the citation, I believe that I am required to rely upon his testimony for the latter part of that section and find that no violation of section 71.603(c) was proven. That does not mean that I am critical of the inspector for having issued the citation because the Commission has constantly pointed out that the purpose of the regulations is to achieve healthful and safe conditions in coal mines and surface facilities and the inspector's testimony shows that this particular drinking fountain needed attention and probably the inspector did the company a service in issuing the citation by showing them that they were not cleaning this fountain as often as was desirable, even though it may have been cleaned 7 days before January 8, 1980. Since I have found that no violation was proven the Proposal for Assessment of Civil Penalty is dismissed to the extent that it alleges a violation of section 71.603(c) in Citation No. 707702.

Citation No. 708229 1/8/80 § 77.1605(d) (Tr. 105-113)

I shall make some findings of fact upon which my decision will be based:

1. On January 8, 1980, Inspector Barry Lawson inspected Martiki Coal Corporation's surface mine. While the inspector was checking equipment, a Caterpillar 992 end loader was driven into the area where the inspector was located. The inspector checked the end loader and then discussed with the operator of the end loader whether the operator had any problems that the inspector had not noted and the operator of the end loader stated that there was a light on the top of the cab which was not working and that the operator would appreciate it if the inspector would have the company replace that light because it helped him when he was operating the end loader. The inspector had noted that the light had been damaged and was not functioning but he wanted to determine whether the lack of light was a problem for the operator. When the operator indicated to the inspector that he would appreciate having the light replaced, the inspector wrote Citation No. 708229 at 9:45 p.m., alleging a violation of section 77.1605(d).

2. There was introduced in evidence as Exhibit C a picture of the end loader here involved after the right topmost light had been replaced. The end loader not only has two topmost lights on each corner of the uppermost part of the cab but also has dual headlights on each side of the cab located at the bottom of the windshield. The evidence shows that all of the lights were functional on the end loader except for the topmost corner light at the top of the cab.

3. Respondent's testimony shows that the Caterpillar Company produces the end loader of the type here involved with what is known as standard lighting and also offers optional lighting. If the Caterpillar 992 end loader is ordered with standard equipment only the dual lights at the bottom of the windshield on each side of the cab are provided. The testimony of one of respondent's witnesses was to the effect that respondent always ordered its 992 end loaders with the two optional headlights at the top of the cab because in respondent's opinion the additional lighting is helpful to the operator of the 992 end loader when they're being used.

4. The foreman of the night operations testified that any light, including those at the top of the cab of the 992 loader, would be replaced immediately if he were aware of the fact that such a light is missing or damaged and he said that in his opinion the lights at the top of the cab do provide illumination which is helpful and that he approves of the fact that his company ordered the equipment with the additional optional lighting at the top of the cab.

5. The inspector believes that the two lights at the top of the cab are very helpful because he says that when the end loader is being operated and the bucket is raised that the lower lights have a tendency to reflect off the bucket into the operator's eyes and that the two additional lights at the top of the cab definitely provide illumination for the operator which is very helpful and would not otherwise be available to the operator to assist him in operating the equipment.

6. The end loader in question had been used during the shift for the purpose of widening a roadway. The work for which it was intended to be used on that shift had been completed and the operator of the end loader was returning it to the storage area, but on the way to the storage area he stopped to ask the foreman, who was in the company of the inspector, if any further work needed to be done with that end loader before it was returned to the parking lot. It was at that point that the inspector examined the lights and other equipment on the end loader and wrote the citation which I have previously described. The inspector stated that the end loader had no other defects and that the only violation that he observed was the lack of a headlight at the top of the cab on the right side.

I think that those are the basic facts which have been adduced by both parties in support or in opposition to the violation alleged in Citation No. 708229.

The section here involved is 77.1605(d), which states in pertinent part that, "Lights shall be provided on both ends when required." The first part of that section refers to mobile equipment. The argument advanced by respondent in this case is that since respondent had provided lights on both ends of the mobile equipment here involved, that respondent was not in violation of that provision because it had purchased this Caterpillar end loader with both standard and optional lighting, that is, with lights at the bottom of the windshield, and those lights were burning, plus one of the optional lights at the top of the windshield, and there were lights on the rear of the end loader. Therefore, it is respondent's position that both ends had been provided with lights as required.

Counsel for the Secretary of Labor, on the other hand, states that he would agree that if the two words, "when required", simply refer to the condition of a piece of equipment as it is delivered with standard equipment, that respondent had complied with section 77.1605(d) because there were in fact lights on both ends. The Secretary's counsel contends, however, that the words, "when required", in that section mean lights required to give the type of illumination that is desirable when a person is operating the end loader. He believes that since the testimony shows that the optional lighting, or both lights, at the top of the cab do provide the light that is required for the best possible vision and illumination when the end loader is being used, that respondent violated section 77.1605(d) when it allowed the end loader to be used without having the optional topmost right lamp in operation.

I cited, in dealing with the previous alleged violation, the Commission's decision in the Ideal Basic Industries case, 3 FMSHRC 843(1981), and I think that that decision is very pertinent to the interpretation that's required in this instance. In that case, as I indicated, the Commission had said that if a piece of equipment is in a work area and it's fully capable of being operated, that that constitutes use of th
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equipment.

The Commission stated in the Ideal Industries case that it believed that interpretations to be given to the statute are those which are likely to prevent accidents, which is the primary goal of the Act. I believe that the interpretation argued for here by the Secretary's counsel is the one which I am required to follow because even respondent's own witness agreed that that one light could make a difference if it were missing. The operation of this equipment is facilitated and the likelihood of accidents is prevented when the operator has the maximum illumination that the equipment was purchased to have on it. Since the operator of the equipment himself is the one who noted to the inspector that he found the extra light to be an advantage, I believe that the words, "when required", in this case must be that interpretation which would require both lights at the top of the cab to be functional. Therefore, I find that a violation of section 77.1605(d) was proven.

Having found a violation, section 110(i) of the Act requires that a civil penalty be assessed. The parties have entered into stipulations which cover some of the six criteria which must be considered pursuant to section 110(i). It has been stipulated that respondent is subject to the Act and that I have jurisdiction to hear the case and that respondent operates the Martiki surface mine here involved.

With respect to the size of the operator's business, it has been stipulated that respondent is a large operator with an annual tonnage of six million, and approximately three million tons for the Martiki surface mine on an annual basis.

Exhibit 1 in this proceeding, and also an additional statement submitted by respondent, show that there has been no previous history of a violation of section 77.1605(d). It has been my practice to increase a penalty under the criterion of history of previous violation only if the evidence before me shows that the violation being considered has been previously violated. Since there has been no previous violation in this instance, the penalty should not be increased under the criterion of history of previous violations.

It has been stipulated that the operator's ability to continue in business would not be adversely affected by the assessment of a civil penalty. It has also been stipulated that all of the violations alleged in this case were abated after the operator had demonstrated a good-faith effort to achieve compliance. In this instance, abatement of the violation alleged in Citation No. 708229 is indicated in a Subsequent Action sheet written by a different inspector from the one who wrote the citation, but it is obvious that respondent demonstrated a good-faith effort to achieve compliance.

As to respondent's negligence, the evidence shows that the end loader here involved was a spare end loader and was only used when one of the other end loaders was not available or that a special job needed to be done that wouldn't take but a short period of time. In this instance, an operator who normally operated a Caterpillar tractor had been asked to use the end loader to widen a place in the road. Consequently, he would not have had any reason to know how long this light had been off the piece of equipment. The supervisor who testified stated that he was not aware of the missing light prior to the time that the end loader was driven to his vicinity. Consequently, the evidence does not support a finding of a high degree of negligence but I assume, since anyone who operates a piece of equipment is required to check it and make sure that it is without defects before it is operated, that we must attribute some negligence in this instance to the fact that this particular piece of equipment was used without having this one light replaced. So I find that ordinary negligence existed.

As to gravity, the final criterion to be considered, there is not any real testimony to show that people were exposed to any great hazard in this instance by the lack of the one light on the right side of the cab because the operator of the end loader did not tell the

inspector where he had used the end loader. The purpose for which it had been used had already been completed. At the time that the end loader was pulled up in the vicinity of the inspector, there was another truck and another end loader in that area, but there was no one on foot, so no one was apparently exposed to any hazard in the circumstances that we have in this case. Consequently, since there's a lack of evidence as to just exactly what was done with the end loader in this instance, I find that there was a low degree of gravity based on the evidence that we have in this proceeding. Considering all those six criteria, as outlined above, I find that a penalty of $50 is adequate.

Citation No. 726078 3/21/80 § 77.1001 (Tr. 326-335)

I shall make some findings of fact on which my decision will be based.

1. Inspector William Creech went to the surface mine of Martiki Coal Corporation on March 21, 1980, to make an inspection based on a complaint which had been submitted to MSHA through another inspector. The complaint was an oral one and apparently alleged that the highwall at the dragline area was unsafe. The inspector was accompanied to the area of the highwall by respondent's assistant safety director. At the highwall the inspector noted some coal production was in progress but the coal was being scraped up about 300 feet from the highwall at the far end of the pit and no actual production was going on close to the highwall.

The inspector noticed a rock near the top of the highwall about 2 to 3 feet in size and which was located about 10 to 12 feet from the top of the highwall. He could not tell whether the rock was loose, but as a matter of judgment, he concluded that it was a hazard because it might be loose. Additionally, he felt there were loose materials at the top of the highwall about 2 to 3 feet in depth, and consequently he wrote Citation No. 726078 stating that loose and unconsolidated material had not been stripped from the top of the highwall in an active dragline pit.

the highwall which forced all traffic to go on the outby side of the berm and therefore insured no people would be closer to the highwall than 20 feet.

3. Respondent presented five witnesses in support of its contention that no violation existed. The composite testimony of all five witnesses is to the effect that, first, the highwall was not unsafe because the rock which the inspector had said was along the face of the highwall was imbedded so far into the basic rock strata that it could not have fallen; and second, respondent's witnesses claim that even if the rock had fallen, it would have been contained by a bench which had been constructed about 25 feet from the bottom of the pit with a width of 15 to 25 feet and therefore anything falling from the highwall would not have endangered anyone working in the pit.

Respondent's witnesses additionally explain that under the ground control plan which they were following but which was technically not in effect at that moment because they had never started using the one which was actually in effect on March 21, 1980, and that under the plan they were actually following, respondent had been cutting a bench along the highwall at all times. Respondent further contends that the ground control plan introduced by the inspector -- that is, Exhibit 9 -- which reflected no bench along the highwall was erroneous because that plan had been submitted in anticipation of respondent's encountering solid sandstone as a highwall, when, in fact, solid sandstone did not materialize for a sufficient length of time to merit going to a vertical highwall without a bench along the highwall.

4. The rock at the top of the highwall which was discussed by the inspector was also the subject of considerable testimony by respondent's witness, James Lewis, who said that he had inspected the rock on March 21, 1980, and that he did not see any cracks in the rock; but he apparently agreed with the inspector that the rock was on the face of the highwall a little distance down from the top.

The other witness was respondent's superintendent, Jerry Lewis, and it was his testimony that the rock was imbedded in the actual top of the highwall but extended down over the face of the highwall so that, if examined from the ground, the rock would appear to be a hazard, but if inspected from the top, it could be seen the rock was thoroughly anchored in the basic strata of the ground and therefore served as no hazard to the people working in the pit area. Jerry Lewis also said that there is some loose material at times on the highwall but that most of the time the dragline succeeds in cleaning it up so as to present no loose material to speak of.

5. Respondent presented as Exhibit D an aerial photograph which shows areas, primarily in the form of shadows, indicating where flat places exist and where elevated places exist. According to James Lewis, a bench was constructed along the highwall at the area which is shown on Exhibit D as of March 21, 1980, and that is quite obvious if one looks at the pit area which is still visible on the aerial photograph at about one inch from the arrow shown on Exhibit D below the words "Pit Area 3-21-80."

I believe those are sufficient findings of fact for rendering a decision in this proceeding. Section 77.1001 provides, "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens or other devices be provided that afford equivalent protection."

If one examines the actual language of the inspector in Citation No. 726078, it can be seen that he stated "loose and unconsolidated material had not been stripped from top of highwall in active dragline pit." It's been my experience over the years that inspectors tend to use the exact language from any of the sections that they are alleging have been violated, and that would be true in this case because the inspector uses the exact language of the first few words of the section by saying that loose and unconsolidated material had not been stripped from the top of the highwall.

Now, if the inspector's testimony had been that the only thing he saw was a rock which he was afraid might fall, then one could say that the only loose material that he was citing was the rock. But he referred to other material sufficiently to have discussed the fact that he thought it was 2 or 3 feet in depth, so I cannot agree with respondent that the only thing that is cited in the citation is a single rock.

Assuming, nevertheless, that the only thing the inspector was concerned about was a rock, we have the other unreassuring testimony of respondent's witness Jerry Lewis, who had examined the rock most carefully, and said that he would want to have examined the rock from both the bottom and the top to be sure that it would not fall or that it was anchored thoroughly in the ground. Since Lewis had looked at the rock from the bottom and the top and felt you could not be sure about it without inspecting both the top and the bottom, it seems to me that he was saying that he couldn't be sure it was thoroughly grounded in the earth from the bottom, and he couldn't be sure of it from the top and it was a judgment matter as to whether this rock could have fallen or not have fallen.

To his credit, we must say he at least looked at it from both the top and the bottom, whereas the inspector did not look at it from both the top and the bottom. If the inspector had looked at it from the top and the bottom, perhaps he would have come to a different conclusion. There is also a difference of opinion between Jerry Lewis and the inspector, and apparently as to James Lewis as well, because James Lewis seemed to think that this rock was somewhere down the side of the highwall, whereas Jerry Lewis thought the rock was solely at the top, with an extension over the side of the highwall.

So, based on the testimony of those who examined this rock, there must be some doubt about whether the rock was safe or not, because according to the inspector, it was doubtful that the rock was safe because he said it was 10 feet or so from the top; and, if it had come loose, it would have come on down the highwall. Jerry Lewis felt you couldn't be

sure about its safety without checking it from both the top and bottom. In evaluating the conflicting testimony, it should be borne in mind that the inspector is required to cite anything which looks to him as if it is a hazard. All of the people who testified in this proceeding agree that this rock could have been a hazard if it had come loose.

Consequently, I don't think I can say the inspector was entirely out of line for being concerned about this rock. Based on the testimony I have received from the two Lewises, I think I would have to find that the rock was not loose and therefore it did not constitute hazardous material.

On the other hand, the problem that bothers me about this rock is that it either was hanging out over the highwall or it was on the highwall in such a position that it might have been hazardous material, and it seems to me the operator should have been able to knock off a piece of rock that big with this huge dragline they use, because they apparently didn't have any trouble doing it anywhere else. So, I don't think this rock should have been left there in the first place, regardless of whether it was loose or not.

In addition to the foregoing observations, there is no testimony by respondent's witnesses which really addresses the inspector's allegation that there were other loose materials at the top of the highwall. Therefore, I shall take the inspector's word that he wrote the citation on the basis of loose materials at the top of the highwall as well as this rock that has been extensively discussed.

The next question that must be decided is whether the section here involved is violated if there is a shelf on this highwall to catch any material that might fall off of it; because the section says, "The loose unconsolidated material shall be sloped to the angle of repose or barriers, baffle boards, screens or other devices be provided that afford equivalent protection." The inspector agreed in his testimony that if there had been a bench 15 to 20 feet wide in this highwall, he would have to say that that would eliminate the violation of section 77.1001. The part of the testimony that is troubling in this area is that it is hard to conceive how the inspector could have been 125 feet from the highwall and not have seen the bench if, in fact, the bench was there.

On the other hand, it's just as hard to conclude that five witnesses presented by respondent would have come into this proceeding and testified in what I felt was a very convincing and straightforward manner that the bench existed if, in fact, it did not. The aerial photograph shows that the bench was there, because it is shown in the picture.

The only explanation I can conjecture which would possibly reconcile the inspector's failure to see this bench with the testimony of respondent's witnesses, who say it was there, is that there may have been some sort of dragline work at one end of this highwall which might have obliterated the bench at the point of entrance into the pit area; but I have no testimony to show that that actually happened. I do believe,

since the inspector had gone here on a complaint, that it would have been possible for him to have been concerned so much about what was at the top of the highwall that he might not have noticed that there was a bench toward the bottom of it. The bench was high enough above the bottom of the pit to have protected anyone in the pit from a fall of this rock or other loose material, because all witnesses stated that the bench was anywhere from 15 to 25 feet wide, and the inspector said that that would be wide enough to provide safety.

I think the preponderance of the evidence, therefore, supports a conclusion that the bench did exist and that it did afford sufficient protection to eliminate a violation of section 77.1001; therefore, I find no violation of section 77.1001 occurred and the Government's proposal for assessment of civil penalty will be dismissed as to the alleged violation of section 77.1001 in Citation No. 726078.

After I had rendered the third bench decision set forth above, counsel for the Secretary of Labor orally moved for reconsideration of the third bench decision on the ground that section 77.1001 is intended not only to protect employees in the pit below the highwall from injury, but also to protect employees from stumbling in loose material on top of the highwall and falling from the highwall into the pit below. The Secretary's counsel stated that although a bench would keep material from falling on men working below a highwall, he did not believe that a bench could be interpreted as being in accord with the rule of ejusdem generis in that a bench was not the same as the other items enumerated in section 77.1001 because the bench would be situated well below the other enumerated devices of "barriers", "baffle boards", and "screens". It was the position of the Secretary's counsel that barriers, etc., would be placed at the top of the highwall to protect men and equipment from going over the edge of the highwall and he believed that a violation had been proven because respondent had not placed any barriers, baffle boards, or screens at the top of the highwall.

Counsel for respondent argued that the Secretary's counsel was belatedly raising an issue and argument on which no testimony whatsoever had been presented and that the Secretary's motion for reconsideration should be denied for raising novel issues as to which the inspector had not testified.

I denied the motion for reconsideration at transcript pages 339 and 340. My reasons for denying the motion should be set out in more detail than they were at the hearing.

As for the argument that benches located a considerable distance from the top of the highwall cannot be considered to be in accord with the principle of ejusdem generis because a bench is not in the same category as the enumerated devices of "barriers", "baffle boards", and "screens" which would be at the top of the highwall, I disagree with the Secretary's argument for at least two reasons. First, I do not believe that the barriers, baffle boards, and screens necessarily have to be placed at the top of the highwall, as was contended by the Secretary's counsel. Section 77.1001 states that "[l]oose hazardous material shall be stripped for a safe distance from the top of pit or highwalls * * *". The section then states that if such materials can't be

sloped to the angle of repose, barriers, baffle boards, screens, or other devices shall be used to afford "equivalent" protection. The words "for a safe distance", in my opinion, mean that no person is required to strip loose materials from the top if doing so would endanger that person's life. Therefore, if the loose materials are too far from the top to be stripped from the top, it may well be that the only way persons in the pit below the highwall can be protected from falling materials is for the operator to construct barriers, baffle boards, screens, and other devices near the bottom of the highwall so that any loose materials will not fall on employees working in the pit.

Second, it must be recalled that the highwall in this instance was about 100 feet in height. Respondent had cut a bench about 25 feet from the bottom of the highwall to protect employees from materials which might fall off the highwall. The construction of barriers, baffle boards, or screens near the top of a highwall which is 100 feet high would be a hazardous undertaking. Yet the inspector wanted employees in the pit to be protected from the possibility that a rock, which was located from 10 to 12 feet from the top of the highwall, might fall from the highwall into the pit below. In such circumstances, I believe that the bench cut along the highwall was the safest way that employees could have been protected and that the bench may properly be considered as the use of a satisfactory "other device" within the meaning of section 77.1001 and application of the principle of ejusdem generis.

As to the argument by the Secretary's counsel that the barriers, etc., required by section 77.1001 must be adequate to protect both equipment and persons from falling from the top of the highwall, it is obviously impractical, if not impossible, to construct a barrier of sufficient strength and size to prevent a dragline 300 feet high (Tr. 338) from slipping or rolling off the top of the highwall if its operator should happen to position it close enough to the edge of the highwall for it to fall off the highwall.

Finally, as I stated at the hearing, there is no language in section 77.1001 which even implies that that section is designed to protect employees from falling off the top of the highwall. Perhaps the most damaging evidence showing that the inspector did not interpret section 77.1001 in the same fashion as the Secretary's counsel argued in support of his motion for reconsideration, is that the inspector allowed respondent to abate the violation in this instance by having respondent construct a berm in the bottom of the pit which would prevent vehicles from getting closer than 20 feet to the highwall. If section 77.1001 is really intended to require barriers at the top of the highwall to prevent employees from falling off the highwall, nothing was done by the inspector in this case to carry out that intent of section 77.1001 because the only protection provided was constructed in the bottom of the pit solely to prevent loose material from falling on employees working in the pit.

For the reasons given above, I find that the motion for reconsideration should be denied.

WHEREFORE, it is ordered:

(A) Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $50.00 for the violation of section 77.1605(d) alleged in Citation No. 708229 issued January 8, 1980.

(B) The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-273 is dismissed insofar as it seeks assessment of civil penalties for the violation of section 71.603(c) alleged in Citation No. 707702 issued January 8, 1980, and for the violation of section 77.1001 alleged in Citation No. 726078 issued March 21, 1980.

(C) The oral motion of the Secretary's counsel for reconsideration of the bench decision appearing at transcript pages 326 to 335 is denied for the reasons hereinbefore given.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 81-74
	:	Assessment Control No. 15-12484-03001
v.	:	
	:	No. 1 Tipple
COMMONWEALTH MINING CO., INC., Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Michael Templeman, President, Commonwealth Mining Co., Inc., Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 4, 1981, as amended October 30, 1981, a hearing in the above-entitled proceeding was held on November 3, 1981, in Prestonsburg, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 160-184):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed on March 5, 1981, by the Secretary of Labor in Docket No. KENT 81-74 alleging four violations of the mandatory safety standards by Commonwealth Mining Co., Inc. A hearing was held and, after testimony had been presented by petitioner and by respondent as to Citation No. 720668, respondent's representative stated that he had another commitment and that he would have time to present testimony only as to one other citation which is No. 947345. During a recess, respondent agreed to pay the full amount of $52.00 proposed by the Assessment Office with respect to two other citations. The result of the settlement as to two citations out of the four alleged by the Proposal for Assessment of Civil Penalty is that the contested aspect of this proceeding involves only two citations. My bench decision will first deal with the two contested citations; the remaining part of my decision will approve the settlement agreed to by the parties.

Contested Citations

Jurisdictional Issue. Respondent raised an issue as to whether the citations involved in this proceeding were properly written with respect to facilities which are subject to the provisions of the Federal Mine Safety and Health Act of 1977. That issue pertains to all four of the citations even though a settlement was reached as to two of them because the settlement was based on the assumption that if I decide

the jurisdictional issue adversely to respondent that the other matters would be considered on the assumption that everything involved in this case is subject to the provisions of the Act. The facilities involved in this proceeding constituted a crushing and processing plant and loading facility for loading coal into railroad cars. The plant had been constructed just a few days before the inspection was made and, in fact, the inspectors wrote their citations on the day that the plant first engaged in a trial period of operation. Consequently, the plant had been run to produce only about a half railroad car of coal before it was shut down in order that the belts could be realigned on the conveyor. It was at that point in time that the citations were written, that is, while the plant was inoperative. It is respondent's position that since coal had neither been sold in interstate commerce or sold so as to affect interstate commerce at the time the citations were written, no jurisdiction should attach to the facilities here involved. Section 4 of the Act provides, with respect to jurisdiction, as follows: "[e]ach coal or other mine, the products of which enter commerce, or the operation or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

The courts have held that when Congress uses the phrase "affecting commerce", that Congress intends for a statute written with that provision in it with respect to jurisdiction to be interpreted to the farthest possible reach of the commerce clause, and a court so stated in Secretary of Interior v. Shingara, 418 F. Supp. 693 (M.D.PA. 1976). In Ray Marshall v. Wade Kilgore, 478 F. Supp. 4 (E.D. TENN. 1979), the court stated that even activity which appears to be entirely intrastate commerce may be regulated where the activity affects commerce. In the Kilgore case, the court indicated the extent to which jurisdiction may be held to apply by citing the Supreme Court's opinion in Wickard v. Filburn, 317 U.S. 111 (1942), in which the Court held that wheat grown for one's own consumption had an effect on commerce because if sold in the market, it would affect the price of wheat, or if eaten, would affect the market because the grower of the wheat would not have to buy wheat. Since the commerce clause has been applied to a person who grows and eats his own wheat, it is certain that the commerce clause would apply to a facility from which coal is sold only in the intrastate market, as apparently was the case for the coal ultimately sold by respondent in this proceeding.

The real thrust of respondent's argument as to jurisdiction, however, is that until coal processed from its plant had actually been sold in interstate or intrastate commerce, no jurisdiction should attach to such facilities or coal. The obvious response to that argument is that independent contractors have been held subject to the jurisdiction of the Act, even though they may construct a shaft or do other work in connection with a coal mine that has never sold any coal at the time they do their work and they may leave the premises and be gone for a month or two before any coal is sold. Yet, the courts have held that their activities and

their workers are subject to the provisions of the Act and that they can be cited for violations which were committed on mine property. 1/

There is no merit to respondent's jurisdictional argument in this case based on the fact that the coal, which has been run through respondent's tipple and processing facilities, had not yet been sold to anyone at the time the citations were written. Obviously, the facilities had been constructed for the purpose of processing coal and the coal, even if ultimately used only in intrastate commerce, would have en affect on commerce and, therefore, be jurisdictional. The mere fact that the inspectors wrote the citations before such coal had started moving in intrastate commerce is immaterial. Therefore, I find that the facilities here in issue were jurisdictional and that all the citations written by the inspectors were properly issued to an operator which was subject to the jurisdiction of the Secretary of Labor and the Commission under the Act.

Citation No. 720668 dated 9/18/80, § 77.701

I shall make some findings of fact with respect to Citation No. 720668 and they will be set forth in enumerated paragraphs.

1. On September 17, 1980, Inspector Martin C. Smallwood was at the No. 1 tipple of Commonwealth Mining Co., Inc., in order to inquire about the operator's training program and some other matters in contemplation that the facility being constructed would soon become operable. While Inspector Smallwood was there, respondent's President requested that the inspector come back the next day, if possible, and bring an electrical inspector with him so that the two inspectors could advise respondent's President as to whether his facility properly complied with the safety standards.

2. The next day, September 18, 1980, two inspectors, Smallwood and Waddles, appeared at the plant. Inspector Waddles is an electrical inspector and he wrote Citation No. 720668, or Exhibit 1, in this proceeding. In that citation, the inspector stated that the crusher plant was not provided with frame grounding for the respective metallic structures where electrical motors and circuits are located. The inspector considered the lack of frame grounding to be a violation of section 77.701 which provides "[m]etallic frames, casings, and other enclosures of electric equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary."

3. The inspector testified that there was one grounding rod in the vicinity of the crusher plant. He was uncertain whether the grounding rod was actually attached to the crusher plant because his citation was written over a year before the testimony in this case was given and his

1/ Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977), and Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir. 1978).

memory simply wasn't sufficiently perfect to enable him to be certain as to that point. The inspector said, however, that if one grounding point had been attached, and he had known it was attached at the time he wrote his citation, that he would not have written the citation with respect to the crusher plant. It is a fact, however, that the crushing plant was only part of the facility here because the crusher plant was also attached to a screening plant and the inspector said that there was no connection between the screening plant and the crushing plant which would have permitted him to find that the screening plant was properly grounded. Therefore, he stated that his citation had primarily been written because there was no interconnection between the crushing plant and the screening plant in the sense that a grounding conductor between the two facilities had actually been installed.

4. The inspector was asked several questions about whether the conveyor belt and its associated framework, which did pass from the crushing facility to the screening facility, would be sufficient to act as a ground, and he stated that it was possible that the metal framework on the crusher extending over to the screening facility might act as a ground in a given situation but that he could not, under the regulations, officially sanction the use of a metal framework on a conveyor belt as an adequate ground within the meaning of section 77.701.

5. The inspector was also asked by respondent's representative in this case if the radial stackers constituted a ground between the crushing facility and the screening facility and the inspector stated that he would not accept that as a grounding mechanism either; and, that he was not acquainted with the exact way that a radial stacker was constructed, but he still would not consider that to be an adequate ground for the purpose of meeting the provisions of section 77.701.

6. The alleged violation was abated rapidly because respondent sent one of its employees to obtain grounding rods and wire immediately after the citation was written and some of the grounds were installed on the same day the citation was written, that is, September 18, 1980; but there was not at the supply house sufficient wire to complete installation of all of the grounds on September 18 and the remainder were installed the following Monday, September 22. Therefore, respondent showed an effort to abate the violation as soon as possible and should be given full credit for that mitigating factor.

7. Counsel for the Secretary of Labor stated that since this was the first inspection made of the facilities of Commonwealth Mining Co., Inc., that no previous citation or alleged violations had been written with respect to Commonwealth Mining Co., Inc.; consequently, there is no history of previous violations to be considered in this proceeding.

8. The facilities involved here were leased from another company and were installed by respondent. Only three employees, plus respondent's President, worked at the facility which never did process more than 500 tons of coal per day. The facility was not operated by respondent after

July 1981 and has now been removed from the premises where the facilities were located at the time the citations were written. On the basis of those facts, I find that respondent is a small operator and that insofar as penalties should be assessed under the criterion of the size of respondent's business, they should be in a low range of magnitude.

9. Respondent first introduced some exhibits with respect to the criterion of whether the payment of penalties would cause respondent to discontinue in business and respondent's representative later stated that he did not wish to avail himself of a defense insofar as respondent's financial condition is concerned; and, therefore, respondent's position in this case is that payment of penalties would not cause respondent to discontinue in business. Respondent is in business at the present time, in that it now operates a surface mining facility, but it is no longer the operator of the tipple which is involved in this proceeding.

10. Respondent's position in this proceeding is based on a combination of arguments and facts. First of all, respondent's testimony in this proceeding was to the effect that when the facilities here involved were moved from a location in the vicinity of Pikeville to the place in the vicinity of Whitesburg, where the facilities were operated at the time the citation was written, a single grounding rod had been attached to the crusher. When respondent reconstructed the facilities after moving them from Pikeville to Whitesburg, a single grounding rod was installed in the same manner that it existed at the previous Pikeville location.

11. Additionally, respondent's President testified that the radial stackers at the plant had been constructed by driving rods through a metal plate into the ground and then attaching the radial stackers to that metal plate, somewhat like a trailer is situated on the fifth wheel of a tractor. Respondent's position is that the radial stackers, plus the framework of the conveyor belt referred to in Finding No. 4 above, constituted a grounding mechanism or connection between the screening plant and the crusher. For abatement in this instance, the inspector required that six grounding rods be driven into the ground around the screening facility and that an additional five grounding rods be driven into the ground around the crushing facility.

Those nine findings constitute the necessary facts required for rendering a decision as to the parties' arguments.

I find that a violation of section 77.701 occurred. I base that conclusion on the fact that the regulation here involved provided that the metal frames, casings and other enclosures of electrical equipment that could become "alive" through failure of insulation should be grounded by methods approved by an authorized representative of the Secretary. Respondent's argument that the facility, as it was installed in Pikeville, met all of the criteria of section 77.701 when it was used in Pikeville and then was cited for a violation under that same section after it was moved to Whitesburg, is not relevant when it comes to

determining whether there was a violation sufficient to bring about a possible hazard to people working at the plant.

There is no proof that the facility was inspected in Pikeville for compliance with the same section here involved. Different inspectors go to the different facilities and they each have certain points that they are trying to check for and they are not always uniform in their interpretation of the regulations. The important thing is that an inspector, in this instance, examined the facilities here involved after they were ready to operate in Whitesburg; and, as far as he was concerned, there was a possibility that the ground that was attached to the crusher was not sufficient to take care of the possible hazard of an "alive" frame or piece of equipment in the screening facility. Since he could not be certain that the metal radial stackers or metal frame on a conveyor belt was a proper ground, he legitimately came to the conclusion that a violation had occurred.

Respondent's other argument was that since respondent had provided a single grounding rod for the crusher that it had, at least, made a bona fide effort to ground the facility. That is a correct statement, and the inspector's having conceded that there probably was a single ground for the crusher, is sufficient to show that respondent was non-negligent in having, so far as it understood the provisions of section 77.701, tried to install a proper ground. In other words, respondent thought it was complying with section 77.701 until it found a different interpretation had been given to that section from the one that respondent had previously expected.

In UMWA v. Kleppe, 562 F.2d 1260, p. 1265, (D.C. Cir. 1977), the Court stated "[s]hould a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred." In Secretary of Labor v. Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (1981), the Commission stated that the primary goal of the regulations and of the Act is to prevent accidents and the Commission stated that the interpretation which gets closer to the occurrence of an accident before a correction is required is the one to be avoided.

In this instance, the inspector could have taken the position, as was apparently done in Pikeville that a special grounding facility was not required for the processing plant or to be placed between the two facilities. The inspector might have taken that position and then, there might have occurred an improper grounding situation in which someone might have been electrocuted. The inspector took a strict approach to the effect that additional grounding was required here and I think that he should be upheld in that position. It is true that the inspector could have stated in his citation that there was not adequate grounding but, since the testimony shows that that is what the inspector intended, the factor of whether there was inadequate grounding or no grounding, can be taken into consideration in assessing the penalty and it is not a reason for vacating the citation or finding that no violation occurred.

Respondent has also pointed out that during his testimony, the inspector stated that there were methods for testing to see whether grounding is adequate but that the inspector did not make those tests in this instance. Respondent takes the position that the inspector's lack of testing prevents the inspector from being certain that respondent's single ground was inadequate. Inasmuch as there did not exist a connection between the crushing facility and the screening facility which could even be considered to be a proper ground, the inspector was within a proper interpretation of section 77.701 to say that he was issuing the citation primarily because of that lack of connection for the screening facility. Since there was not a proper ground between the two facilities, it was unnecessary for him to get into the question of what might have been adequate for the crusher because he thought that whatever safety that ground might have provided for the crusher, it was insufficient to make the installation safe as a total facility.

By way of summary, the violation of section 77.701 involves a small operator. There was no negligence on the part of respondent because it thought it had installed a satisfactory ground. The violation did not, at the time the inspector made his interpretation, involve a serious matter because he stated that he saw no poor insulation on any of the conductors or electrical facilities. Nevertheless, there existed a potential hazard to the extent of possible electrocution. Since electrocution still accounts for a lot of deaths in coal mines and related facilities, there was a cogent reason for this facility to be grounded properly. At the same time, the evidence fails to show that there was a hazard at the time the citation was issued. The operator showed a very rapid effort to achieve compliance by getting the necessary equipment and beginning the installation of the grounds within the same day. There is no history of previous violations. Consequently, a large penalty in this instance would be contrary to the six criteria which are required to be considered under section 110(i) of the Act. In such circumstances, I find that a penalty of $5 should be assessed.

Citation No. 947345, dated 9/18/80, § 77.206(c)

A few findings of fact are required before a decision is rendered as to whether a violation occurred.

1. Inspector Smallwood issued Citation No. 947345 on the same day that the previous citation discussed above was written. That citation provides that vertical ladders at fixed locations were not provided with backguards which extended no more than 7 feet from the bottom of the ladder to the top of the ladder.

2. The inspector cited section 77.206(c) as having been violated and that Regulation reads as follows: "[s]teep or vertical ladders which are used regularly at fixed locations shall be anchored securely and provided with backguards extending from a point not more than 7 feet from the bottom of the ladder to the top of the ladder."

3. In order to understand the factual situation with respect to the violation here involved, it is necessary to refer to a diagram which was introduced at the hearing as Exhibit 3. That exhibit shows that the fixed ladder involved was actually 6-1/2 feet tall and its bottom began 1-1/2 feet off the ground. The exhibit shows that the top of the ladder ended at the platform shown on the exhibit and a handrail is provided on the platform but the handrail is not a part of the ladder itself. The exhibit also shows that the bottom of the ladder was 1-1/2 feet off the ground.

4. The inspector took the position at the hearing that section 77.206(c) requires backguards to be installed if the height of a ladder is more than 7 feet. The inspector believed that the ladder here involved was more than 7 feet high because he measured the distance from the ground to the top of the ladder and found the space between the ground and the top of the ladder to be eight (8') feet and he believed that the requirements of section 77.206(c) should be applied to any situation where the ladder was in a position enabling a person to climb it and be off the ground by more than 7 feet and he believed that the protection of the backguard was required in this instance if the height of the ladder, from the ground to the top, was an 8-foot distance even though the ladder itself only measured 6-1/2 feet.

I believe that those four findings are all that are needed for discussing whether a violation occurred because the violation depends on the interpretation which is given to the language of section 77.206(c). Respondent took the position at the hearing that the ladder did not require a backguard because it was only 6-1/2 feet long. Since it was less than 7 feet, respondent concluded that the section did not require a backguard on the ladder. Respondent's representative also believed that adding the 1-1/2 foot distance between the bottom of the ladder and the ground to obtain the ladder's true height was not appropriate within the meaning of the regulation because he said that there was no provision about the distance between the top of the ladder and the ground or any platform that might be beneath the ladder. He quoted section 77.206(c) to emphasize that the backguard should not be at a point more than 7 feet from the bottom of the ladder.

As I have previously indicated in making my conclusions with respect to the violation of section 77.701 discussed above, the courts and the Commission have emphasized interpretations to be given to the regulations which will promote safety. The interpretation which would promote safety in this instance is the inspector's interpretation and the interpretation urged by counsel for the Secretary. If a ladder starts at a distance above the ground which can be reached by a person who lifts his or her foot to start the initial ascent of the ladder, then, at that point, the person taking the first step to the bottom of the ladder is already off the ground by 1-1/2 feet in this instance. It could just as easily be 2 feet in another case. By the time a person reaches the top of the ladder, he or she is 8 feet off the ground in this instance. If the 7 foot requirement for backguards were applied

on the assumption that a fall for a distance of 7 feet, or more, is likely to result in serious injury, then, obviously, anyone climbing a distance which is more than 7 feet off the ground would be exposed to a possible fall; therefore, the backguard should be required.

In this instance, the inspector allowed the operator to abate the violation by placing cinder blocks beneath the bottom of the ladder so as to make a platform from which a person would ascend the ladder. Obviously, if one brings the earth or the platform up to the bottom of the ladder, one eliminates a distance of 1-1/2 feet. Therefore, the ladder did not have to have backguards constructed at all because increasing the ground level below the ladder eliminated the possible fall of 7 feet or more. The inspector stated that although he had allowed abatement to be done in this instance by the construction of a cinder block platform beneath the ladder, he was not certain that that was the proper way to abate the citation.

Another argument which respondent's representative made in opposition to having to install backguards on a ladder which is only 6-1/2 feet long, is that he said there was a hinge point in the middle of the ladder which enabled the operator to raise the ladder for the purpose of cleaning beneath it. He stated that if one were to put a backguard on the ladder and it extended down past the hinge point, that the ladder would then be rendered rigid and could not be raised for cleaning purposes. The obvious reply to that argument is that the backguard can begin at a point not more than 7 feet from the bottom of the ladder. Therefore, the backguard could begin just above the center point of the ladder and provide protection for a person climbing the ladder and still allow the ladder to be raised for cleaning beneath it.

An additional argument relied upon by respondent is that the facility involved here had been previously installed in Pikeville and had been approved by MSHA as it was there installed and, that since it had been approved by MSHA as it existed in Pikeville, that is, using a 6-1/2 foot ladder which did not require a backguard, that it was improper for the inspector to cite a facility as being in violation of section 77.206(c), when, in fact, that facility had already been approved by MSHA. Respondent's representative claimed that he had checked with the company that constructed this facility with the 6-1/2 foot ladder on it and that the company told him that the ladders had been made 6-1/2 feet tall for the specific purpose of eliminating the need for the ladders to be equipped with backguards.

Whether or not the facility had previously been approved by MSHA is not material when it comes to an interpretation of what section 77.206 means. As counsel for the Secretary has appropriately argued in this proceeding, the regulation still exists and if MSHA, in approving this facility, made an interpretation of that regulation which would bring about less protection than a correct interpretation would provide for miners, then the facility as it was installed needed to be modified to provide that protection by either raising the platform or ground beneath the ladder to a point that a person is not subjected to a fall

of more than 7 feet, or by having the backguards installed, as required by section 77.206(c). Therefore, I find that a violation of section 77.206(c) occurred.

In dealing with assessment of a penalty, the findings that have been given above with respect to several of the assessment criteria are applicable for this violation also. Respondent is a small operator. There is no history of previous violations. The work for abating the violation was commenced the same day that the violation was cited and was continued over a period of time until all of the ladders, of which there were four or five at both the screening plant and the crushing plant, were all modified to provide for abatement. Insofar as negligence is concerned, I think here again, respondent would have to be considered nonnegligent because respondent was relying on its interpretation of section 77.206(c) as well as the fact that it claims the facility had been approved by MSHA as it then existed and as it had been originally constructed. Insofar as gravity is concerned, it was just barely high enough to require a backguard, so any fall would have been at most from a height of 8 feet, but it still could have caused an injury which might have required several days of absence from work and, therefore, was at least moderately serious. Considering those findings as to the six criteria, I believe that a penalty of $10 should be assessed for this violation.

Settlement Agreement

As indicated in the opening paragraph of my bench decision, the parties entered into a settlement agreement with respect to two of the four violations for which civil penalties are sought in this proceeding (Tr. 103-104). Under the settlement agreement, respondent would pay the full amount proposed by the Assessment Office with respect to a violation of section 77.400 ($24.00) and a violation of section 77.205(b) ($28.00).

In determining whether the settlement agreement should be accepted, it is unnecessary to discuss three of the six assessment criteria because my bench decision already contains findings to the effect that respondent is a small operator, that payment of penalties will not cause it to discontinue in business, and that respondent has no history of previous violations.

The remaining three criteria of whether respondent demonstrated a good-faith effort to achieve rapid compliance, whether the violation were associated with negligence, and whether the violations exposed miners to serious or non-serious injury will be considered in evaluating each of the two alleged violations.

The first violation was alleged in Citation No. 947343 which stated that respondent had violated section 77.400 by failing to provide a guard on the chain drive for the feeder under the raw coal hopper. The location of the chain drive was in a remote place where employees go only when they need to work on the equipment, so the likelihood of injury was reduced by the location of the

chain drive. The violation was associated with ordinary negligence and a normal effort was made to achieve rapid compliance because respondent placed a guard on the chain drive within the time period given by the inspector. Inasmuch as a small operator is involved, it appears that the penalty of $24.00 proposed by the Assessment Office was reasonably determined and that respondent's agreement to pay the full amount proposed by the Assessment Office should be approved.

The second violation involved in the settlement agreement was a violation of section 77.205(b) alleged in Citation No. 947346 which stated that the travelways in and around the tipple were not kept free of extraneous material which constituted stumbling or slipping hazards. In the absence of any details as to the size and extent of the material which caused the stumbling or slipping hazards, it is difficult to evaluate respondent's negligence as well as the gravity of the stumbling or slipping hazards. The subsequent action sheet shows, however, that respondent cleaned up the extraneous material within the time allowed by the inspector. In view of the operator's small size, it appears that the Assessment Office appropriately proposed a penalty of $28.00 for this alleged violation of section 77.205(b) and that respondent's agreement to pay the full amount should be approved.

WHEREFORE, it is ordered:

(A) Respondent, within 30 days from the date of this decision, shall pay civil penalties of $15.00, of which an amount of $5.00 is assessed for the violation of section 77.701 alleged in Citation No. 720668 dated September 18, 1980, and of which the remaining amount of $10.00 is assessed for the violation of section 77.206(c) alleged in Citation No. 947345 dated September 18, 1980.

(B) The parties' oral request for approval of settlement is granted and the settlement agreement is approved.

(C) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $52.00 of which an amount of $24.00 is allocated to the violation of section 77.400 alleged in Citation No. 947343 dated September 18, 1980, and of which an amount of $28.00 is allocated to the violation of section 77.205(b) alleged in Citation No. 947346 dated September 18, 1980.

(D) The total amount due under paragraphs (A) and (C) above is $67.00.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

Thomas A. Grooms, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Commonwealth Mining Co., Inc., Attention: Michael Templeman, President, P.O. Box 2497, Pikeville, KY 41501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 30 1981

ERNEST DIALS, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. KENT 81-89-D
WOLF CREEK COLLIERIES, Respondent	:	

DECISION

Appearances: Reginald E. Wilcox, Esq., Kirk & Wilcox, Inez, Kentucky, for Complainant;
Donald Combs, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order issued July 15, 1981, as amended August 5, 1981, October 1, 1981, October 16, 1981, and November 2, 1981, a hearing in the above-entitled proceeding was held on November 6, 1981, in Prestonsburg, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 282-303):

This hearing involves a Complaint of Discharge, Discrimination or Interference filed on February 19, 1981, in Docket No. KENT 81-89-D, by Ernest Dials pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, alleging that complainant was discharged by respondent, Wolf Creek Collieries, on November 20, 1980, in violation of section 105(c)(1) of the Act because complainant had made health or safety complaints to respondent or respondent's agent regarding conditions at respondent's mine.

The issue in this case is whether respondent violated section 105(c)(1) of the Act so as to entitle complainant to the relief of payment of backpay and reinstatement to his former job as requested in his complaint. The pertinent part of section 105(c)(1) which is involved in this proceeding, reads as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent * * * of an alleged danger or safety or health violation in a coal or other mine * * * .

I shall make some findings of fact on which my decision will be based. The findings will be set forth in enumerated paragraphs.

1. Complainant, Ernest Dials, had been working for respondent, Wolf Creek Collieries for about 11-1/2 years before he was discharged on November 20, 1980. His official job title was truck foreman on the second shift but, because of an injury unrelated to performance of his work for respondent, complainant had been unable to work for about 6 weeks. During complainant's recuperation, respondent appointed another employee, Raymond Haney, to be truck foreman in complainant's absence.

2. When complainant reported to work after his illness, he was given many different kinds of work to do, ranging from constructing a bridge floor to substituting for other foremen when they were absent because of vacation or other reasons. Complainant received his full salary during his convalescence and his salary was not reduced after he returned to work and was given a wide variety of duties to perform.

3. The events of November 18, 19, and 20 leading up to complainant's discharge were discussed by several witnesses. On Tuesday, November 18, complainant worked with two other men under supervision of the mine superintendent, Luster Sluss, in installing a floor in a bridge. On Wednesday, November 19, complainant was ill and did not report for work on the day shift, but complainant did come to the mine office about 4:00 p.m. on that day to discuss with the Vice President of Operations, Raymond Freal Mize, a report to the effect that complainant had taken two tires after work on Tuesday night. Mize had already checked on the tires and found that they had been taken from the mine site for use on a piece of respondent's equipment which had previously been loaned to the Sheriff of Martin County.

4. Mize told complainant that no one was blaming him for the tires' disappearance and Mize advised complainant to go home and report back to work on the day shift at 6:30 a.m. the next day. After Mize left the office, he went to the supply shop and talked to a mechanic named Cecil Butcher. Some spare parts were loaded into the truck which complainant was driving and complainant started to drive to the 10D Mine which was located some 4 or 5 miles from the mine office. On complainant's way to the 10D Mine, he came to an end loader which was idle. The operator of the end loader, Brian Webb, was standing near the end loader and complainant asked Webb if the end loader was in safe condition. Complainant then proceeded to check the lights, the back-up alarm and other aspects of the end loader and found them to be in satisfactory condition. Complainant then asked Webb if the brakes were satisfactory and Webb stated that the brakes on the 560 end loader being used at that time were not as good as the brakes on one of the other 560 end loaders, but that the brakes were satisfactory for the work being done at that time. When Webb indicated to complainant that the brakes might not be sufficiently adequate on a hill to stop the end loader readily, complainant ordered Webb to park the end loader and not operate it until a mechanic had been called to check the brakes.

5. Complainant did not get out of his truck to operate the end loader and simply took Webb's statement to be an indication that the end loader was unsafe. Complainant then called the supervisor on the second shift, Raymond Haney, and told him that the end loader had been parked and would not be operated until it could be checked by the mechanic. Complainant had already advised Haney that the trucks which were hauling coal from the place where Webb was working were unsafe and would not be permitted to operate. Complainant thereafter called Cecil Butcher, the mechanic, and asked him to come and check the end loader's brakes. The mechanic was not certain that complainant had authority to request him to check the brakes and called Haney to ask if he should do so. Haney told the mechanic to go ahead and check the brakes.

6. Butcher went to the location of the end loader and examined the brakes and decided to adjust them but he did not get into the end loader and operate it. After he had adjusted the brakes, Butcher left without checking to see whether the end loader's brakes were in any better condition after the adjustment than they had been before the adjustment. The operator of the end loader resumed loading coal because Haney had succeeded in getting some trucks back to the mine site after he had examined the trucks and determined that they were satisfactorily equipped with adequate brakes.

7. Complainant subsequently went from the site of the end loader to the 10D Mine where the spare parts which had been put in his truck were unloaded. At approximately that time, complainant received a call from the Vice President of the company, Freal Mize, to report to the guard house. Complainant went to the guard house where there were other personnel, including two truck drivers and a security guard. While Mize and complainant were talking, the Sheriff of Martin County also came to the guard house. Mize and complainant had a discussion during which some additional reference was made to the incident of the tires having been taken and also to the fact that complainant had stopped the end loader from operating; finally, Mize told complainant that he should leave the mine site and go home and return to work the next day, as he had previously been instructed to do.

8. Complainant states that Mize indicated, at that time, that if complainant did not get off of the mine property and start following instructions that he might be discharged and complainant asked Mize if that meant that he was discharged and Mize said that complainant could interpret that remark any way he wished to.

9. The next morning, November 20, 1980, complainant returned to the mine as he had been instructed to do. Complainant went to the mine office and stayed in the vicinity of the mine office because he claimed that he could not locate Sluss, the superintendent, to whom he had been instructed to report on November 20. After complainant had been in the vicinity of the mine office for approximately 1-1/2 hours, Mize appeared and told complainant that he was being discharged for unsatisfactory work.

10. Complainant contends that the only reason that Mize could have had for discharging him was that he had stopped the end loader and trucks from operating on the previous day and that Mize was upset with his having done so. Complainant also states that it was a frequent, in fact, almost daily, occurrence that he would order equipment to be taken out of service because it was unsafe. He also alleges that he was told to operate a truck, on one occasion, with defective Jacobs brake at a time when the oil gauge showed only 30 pounds of pressure, whereas, according to complainant, the oil pressure should be in the neighborhood of 85 pounds in order for the Jacobs brake to work properly. Complainant also contends that he was told to allow equipment to be operated on other occasions when he considered it to be unsafe.

11. The Vice President of Operations, Freal Mize, testified that complainant had been discharged on November 20 for the many disruptive acts that he had committed on November 19. After Mize had returned home and had eaten dinner on November 19, he started getting reports about complainant's activities at the mine site. Around 8:30 p.m. Mize was informed that complainant had returned to mine property and had been challenged by the security guard, but the guard had allowed entrance because complainant had said that if the security guard didn't let him go by the guard house, that there were other ways he could enter mine property. Even though the security guard allowed complainant to enter mine property, he called Mize about it because he was not sure that complainant should be on mine property at that time of night because it was not complainant's working shift at that time.

The activities in which complainant engaged that evening are hereinafter described. Complainant went to the area of the unloading of coal and told Haney, who was supervising the surface activity of the loading and unloading of coal on the second shift, that he was going to close down Haney's operation. Complainant then went to the 10D underground mine and talked to Clay Dials, who was working at the 10D Mine, and advised the employees in the 10D Mine that they should come out of the mine because a Federal inspection was going to be made at the mine at 9:00 p.m. Complainant thereafter went to the No. 11 underground mine and used the mine telephone to call underground and talk to a roof bolter named Joey Stepp. A considerable discussion ensued which was overheard by the mine foreman, Roger Scott. At first, complainant tried to get Stepp to have the men leave the mine because complainant said that he was on strike because of his treatment by the Vice President. According to Scott, the latter part of Stepp's and complainant's conversation showed that complainant had decided not to ask the men to walk out on strike. Instead, complainant asked Stepp to meet him about 12:30 a.m., after the second shift had been completed, for the purpose of helping complainant to set up a picket line at the mine site.

12. Mize also testified that complainant had returned to mine property so late in the evening of November 19 that the security guards were worried about his presence and Mize advised them to find complainant and remove him bodily from mine property. The security guards were reluctant to do so by themselves. Therefore, a deputy sheriff was asked

to come and assist the security guards in getting complainant to leave mine property. As it turned out, the security guard and the deputy sheriff were unable to find complainant and it is assumed that complainant left mine property by some exit other than coming by the guard house. It was Mize's contention at the hearing that he had discharged complainant because complainant had interfered with the mine's operation and had tried to close down the surface activity, as well as the underground mine Nos. 11 and 10D. Complainant has never had any authority at all in the operation of the underground mines and, as has been indicated above, complainant's employment status on November 19 was not that of a truck foreman on any of the shifts. Instead, after the convalescence referred to in Finding No. 2 above, complainant had been given work as a substitute foreman and had been assigned other kinds of work on a day-to-day basis.

13. The testimony of Mize was corroborated in this proceeding by other witnesses. Raymond Haney, the truck foreman on the night shift, stated that it was a fact that complainant had tried to close down his operation on the evening of November 19. Haney testified that he checked the end loader after its brakes had been adjusted by Butcher, the mechanic, and that Webb, the operator of the end loader, was satisfied that the brakes were in satisfactory condition; that there was no reason that coal could not be loaded without any hazardous exposure of miners to injury. Haney also testified that, insofar as a Jacobs brake on a truck is concerned, he had operated a truck for a number of years even though he does not have a left arm. Since a Jacobs brake is operated by a lever located in the left corner of the windshield, it would have been difficult for him to have used such a brake because of his missing left arm. Therefore, Haney stated that he never used a Jacobs brake and felt that any truck was safe so long as its other brakes were working. In fact, Haney did not even think Jacobs brakes were desirable. Haney stated that he checked with the drivers of the coal trucks on the evening of November 19, and that they assured him their brakes were satisfactory. He asked a number of the drivers to stop their trucks while loaded, and they were able to stop in a normal distance; therefore, he believed that there was no basis for complainant's contention that the trucks were unsafe.

14. Brian Webb, the operator of the end loader, which was ordered to be parked by complainant, stated that he was standing by the end loader at the time that complainant came by and that he had not stopped operating the end loader because of any unsafe condition on it, but because there were no trucks available to load at that moment, and he had gotten out of the end loader to stretch himself and to get close to a nearby fire to warm himself. He said the end loader was parked at complainant's instructions only because complainant had previously been a foreman and Webb had never been told not to take instructions from complainant even though Webb knew on November 19 that complainant was not his immediate supervisor on that shift. After the brakes had been adjusted by Butcher, Webb continued to load coal on the second shift without any further problems. Webb also testified, contrary to complainant's contention, that he had not been told by the mechanic that the end loader should be used only on the level on which it was being used the evening that complainant had required the end loader to be stopped.

15. The mechanic who repaired the end loader, Cecil Butcher, stated that he could not recall for certain whether he had ever told Haney or Webb that the end loader should be used only on level ground; that is, that it should not be taken down a hill. Butcher's testimony is somewhat inconsistent as to whether he did or did not know that the end loader needed additional work to be done on its brakes because he first stated that he might or might not have said that the end loader should not be operated on a hill. Later he stated that he had not operated the end loader, personally, on November 19 and could not state for certain whether it was safe on a hill or not. Thereafter, though, he stated that about a week after the incident of November 19, the brakes on the end loader had been overhauled. Therefore, it is possible that the brakes on the end loader would not have been sufficient to hold it on a hill; but since complainant didn't operate the end loader and Butcher did not personally operate the end loader, the only testimony in the proceeding which is reliable and probative is the testimony of the operator of the end loader, Brian Webb, who stated that the brakes were satisfactory; that he had had no problem with them before complainant ordered the end loader to be stopped, and that he had no problem with the end loader after the brakes had been adjusted.

16. The superintendent or foreman at the No. 11 Mine, Roger Dale Scott, testified that it was correct that complainant had come to his No. 11 Mine about 8:30 p.m. and had asked to speak to Joey Stepp on the mine phone; that Scott allowed complainant to do so, and it was at that time that Scott overheard complainant state that he was going to set up a picket line. There are exhibits in evidence which show that complainant did subsequently set up a picket line at the mine and it was necessary for respondent to get a temporary restraining order to prohibit complainant from continuing to picket at the mine.

The above findings of fact are sufficient for rendering a decision in this case. Although it is true that complainant on November 19 did have an end loader to stop operating because there was a doubt about the effectiveness of the end loader's brakes, there has been no testimony by anyone that any of the trucks which were stopped by complainant actually had defective brakes. Even complainant did not state that he personally had examined any of the trucks and knew for a fact that their brakes were defective. Therefore, if there is to be any finding to the effect that complainant was discharged because of his having made safety complaints at respondent's mine, that finding would have to be made with respect to the end loader.

It is probably true that Mize, the Vice President who discharged complainant, was upset about complainant's having stopped the end loader from operating because of alleged unsafe brakes. The testimony, however, shows that Mize was upset more because complainant had done that stopping of the end loader at a time when he was not officially in charge of the personnel who were working at the mine. The complainant had been told to go home and return the next day to work on the day shift. Complainant had come to the mine on his own volition on November 19 to complain about questions having been raised as to his integrity in allowing tires

to be put on some of respondent's equipment which had been loaned to the sheriff. Complainant then ignored his supervisor's instructions about his need to be on mine property. Consequently, even though the brakes may have needed adjusting on the end loader, the fact that that adjustment was performed and that complainant had asked that the brakes be inspected, appears in no way to have had a bearing on complainant's discharge.

It is a fact that when complainant was told to leave the mine on November 19 in the neighborhood of 5:00 p.m., and later in the neighborhood of 7:00 to 7:30 p.m., there was no mention that he had been discharged for certain. If complainant had known that he had been discharged, or thought for certain that he had been discharged on November 19, he, of course, would not have reported for work at the mine on November 20, as Mize had instructed him to do.

The fact that complainant was discharged early in the morning on November 20 shows that something unusual had to have occurred between the time complainant left the mine on November 19 and the time that he was dscharged on November 20. Since complainant had engaged in a large number of disruptive activities which were certainly not in pursuit of tasks that he had been officially hired to do, his authority for engaging in any of the aforementioned activities on November 19 is entirely lacking. Complainant tried to justify his having stopped the end loader on November 19, on the basis that he had previously been a supervisor and that it was the company's policy that any supervisor could stop unsafe activities no matter when he saw those activities or whether they occurred on his own shift or some other supervisor's shift.

It is significant that no specific action was taken by Mize to fire complainant on November 19 at a time when the only knowledge Mize had as to complainant's activities was that he had stopped the end loader until its brakes could be checked. If Mize was upset over that incident enough to have discharged him, there is no reason for Mize to have told complainant that complainant could use his own judgment as to whether Mize's remarks meant that complainant had been discharged on November 19. On November 20, when Mize did discharge complainant, he left no doubt about the fact that complainant had been discharged. The reason for the discharge on November 20 was solely related to complainant's unauthorized and unwarranted attempt to cause trouble at three different mines in retaliation for the fact that complainant had been told to go home and come back to work the next day when his anger about the incident of the tires had subsided.

It should be noted that complainant's action of trying to get the superintendent of the 10D Mine to withdraw his miners because there was allegedly going to be a Federal inspection at the mine at 9:00 p.m. was especially reprehensible conduct in view of the fact that section 110(e) of the Act provides that "[u]nless otherwise authorized by this Act, any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both." In light of the fact that complainant had violated the spirit of the Act in

deliberately announcing a bogus inspection as part of his retaliatory conduct of November 19, it ill behooves him to come into this proceeding with a claim that he was discharged because respondent had violated section 105(c)(1) of the Act by discharging him because of alleged complaints about the lack of adequete brakes on an end loader.

In Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), 1/ the Commission stated that if a miner's evidence, in general, shows that he engaged in a protected activity and that the adverse action or discharge was motivated in any part by the protected activity, it is complainant's obligation to prove that he was discharged for such protected activity. The Commission stated that if complainant sustains his burden in the first instance, respondent then has the burden of showing by a preponderance of the evidence that even if some aspects of its discharge were motivated by the complainant's protected activity, that complainant would, nevertheless, have been discharged in any event for unprotected activities alone.

At the conclusion of complainant's testimony, I denied a motion by respondent's counsel to dismiss the complaint because of complainant's failure to maintain a prima facie case of discharge for protected activity. On the basis of complainant's testimony, if it had not been completely rebutted by respondent, I would have held that there was no apparent reason for complainant to have been discharged other than for his having stopped the end loader from operating on November 19.

Now that I have heard respondent's evidence, however, it is clear that complainant's credibility has been greatly impaired by his omission of occurrences on November 19 and by his failure to explain or justify his activities at the mine on the evening of November 19. Respondent's evidence supports a finding that complainant would have been discharged regardless of his alleged protected activity and shows, in addition, that respondent's reason for discharging complainant had no actual relationship to the stopping of the end loader from operating. The most that can be said as to complainant's alleged protected activity is that he stopped an end loader from operating at a time when he was not on official duty and was not clothed with supervisory powers. After complainant had stopped the end loader, he thereafter tried to stop normal mining activities at three different mines even though he made absolutely no allegations that his disruptive acts had any relation to health or safety matters of any kind.

Consequently, I believe that the Pasula case, supra, is inapplicable to this proceeding because respondent's evidence shows that complainant was solely discharged for reasons other than his alleged protected activities.

1/ The Pasula case was reversed on grounds not here discussed in Consolidation Coal Co. v. Pasula, et al., _____F.2d _____ (No. 80-2600, 3d Cir., decided Oct. 30, 1981).

WHEREFORE, it is ordered:

The Complaint of Discharge, Discrimination, or Interference filed in Docket No. KENT 81-89-D is denied because of complainant's failure to prove that his discharge was motivated by any activity protected under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

DEC 30 1981

CONSOLIDATION COAL COMPANY, Contestant	:	Notice of Contest
v.	:	Docket No. LAKE 80-352-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Citation No. 823213 June 9, 1980
Respondent	:	Franklin Highwall No. 65 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 81-67 A/O No. 33-01065-03028F
v.	:	Franklin Highwall No. 65 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Secretary of Labor;
Jerry F. Palmer, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Cook

I. Procedural Background

On July 7, 1980, Consolidation Coal Company (Consol) filed a notice of contest in Docket No. LAKE 80-352-R pursuant to section 105(d) 1/ of the

1/ Section 105(d) of the 1977 Mine Act provides as follows:
"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or

Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979) (1977 Mine Act), to contest section 104(d)(1) 2/ Citation No. 823213. The notice of contest states, in part, as follows:

> 1. At or about 1200 hours on June 9, 1980, Federal Coal Mine Inspector, Jack C. Cologie, (A.R. 2-1548) representing himself to be a duly authorized representative of the Secretary of Labor (hereinafter "Inspector") issued Citation No. 0823213 (hereinafter "Citation") pursuant to the provisions contained in Section 104(d)(1) of the Act to Mike Torchik, Safety Supervisor, for a condition he allegedly

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fn. 1 (continued)
any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

2/ Section 104(d)(1) of the 1977 Mine Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

observed during an "AFB" inspection (accident inspection) in the Franklin Highwall #65 Mine, Identification No. 33-01065, located in Ohio. A copy of this Citation is attached hereto as Exhibit "A" in accordance with 29 C.F.R. Section 2700.20(c).

2. Said Citation under that heading captioned "Condition or Practice" alleges that:

> "An accident investigation revealed that work was being performed underneath an automobile in the outside maintenance shop on June 7, 1980. The automobile was raised with an electric hoist and was not blocked before the maintenance foreman began working underneath the vehicle. Ed Blazeski was the maintenance foreman. This was unwarrantable failure.

3. Said Citation contained the allegation that the above condition or practice constituted a violation of 30 C.F.R. 77.405(b), a mandatory health or safety standard and that the alleged violation was of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The Inspector further determined that the alleged violation was caused by an unwarrantable failure to comply with the stated standard.

4. At or about 0900 hours on June 10, 1980, Inspector Cologie issued a termination of said Citation. A copy of this termination is attached hereto as Exhibit "A1."

5. Consol avers that the Citation is invalid and void, and in support of its position states:

(a) That the Citation fails to cite a condition or practice which constituted a violation of mandatory health or safety standard 30 C.F.R. 77.405(b), and

(b) That the Citation fails to cite a condition or practice caused by an unwarrantable failure of Consol to comply with any mandatory health or safety standard;

(c) That the Citation fails to state a condition or practice which could significantly and substantially contribute to the cause and/or effect of a mine safety or health hazard;

(d) That several assertions contained in the Citation and upon which the Citation was based are inaccurate.

6. Consol requests an investigation of this Citation and further requests Cadiz, Ohio as the site for a public hearing on this Notice of Contest.

WHEREFORE, Consol respectfully requests that its Notice of Contest be granted and for all of the above and other good reasons, Consol additionally requests that the subject Citation be vacated or set aside and that all actions taken or to be taken with respect thereto or in consequence thereof be declared null, void and of no effect.

An answer was filed by the Secretary of Labor (Secretary) on October 27, 1980. In his answer, the Secretary (1) admitted the issuance of Citation No. 823213 and stated that it was properly issued pursuant to section 104(d) of the 1977 Mine Act; (2) submitted that Consol violated a mandatory standard and that such violation was caused by Consol's unwarrantable failure to comply with the cited mandatory standard; (3) specifically denied the allegations set forth in Paragraph Nos. 5(a), 5(b), 5(c), and 5(d) of Consol's notice of contest; and (4) denied all other allegations set forth in Consol's notice of contest. The Secretary prayed for the entry of an order denying the relief requested by Consol and affirming the citation.

On November 10, 1980, Consol filed a motion requesting, amongst other things, the entry of an order continuing the proceeding pending the filing of the associated civil penalty case. The requested continuance was granted on December 9, 1980.

On January 26, 1981, the Secretary filed a proposal for a penalty in the associated civil penalty case, Docket No. LAKE 81-67, pursuant to section 110(a) of the 1977 Act praying for the assessment of a civil penalty for the alleged violation of mandatory safety standard 30 C.F.R. § 77.405(b) set forth in Citation No. 823213. Consol filed an answer on February 13, 1981.

Rule 27(d) of the Rules of Procedure of the Federal Mine Safety and Health Review Commission, 29 C.F.R. § 2700.27(d) (1980), requires that "[a] legible copy of each citation or order for which a penalty is sought shall be attached to the proposal [for a penalty filed by the Secretary]." The proposal for a penalty filed on January 26, 1981, failed to comply with this requirement in that a copy of section 103(k) Order No. 823212 was attached thereto instead of a copy of Citation No. 823213. On April 7, 1981, the Secretary filed a motion to amend the proposal for a penalty to substitute a copy of Citation No. 823213 and related attachments for those filed on January 26, 1981. The motion was granted on April 23, 1981.

Pursuant to various notices, the hearing was held on May 1, 1981, with representatives of both parties present and participating. Consol moved to dismiss the charge of violation at the close of the Secretary's case-in-chief. A ruling on the motion is set forth herein. Additionally, the record was left open for the posthearing filing of a computer printout setting forth the

history of previous violations at Consol's Franklin Highwall No. 65 Mine. On May 27, 1981, the Secretary filed the computer printout, and on June 12, 1981, Consol filed a written communication stating that it had no objection to the document's receipt in evidence. Accordingly, on June 15, 1981, an order was issued receiving the computer printout, denominated as Exhibit M-1, in evidence.

At the conclusion of the hearing on May 1, 1981, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, the schedule was later revised due to difficulties experienced by counsel. The Secretary and Consol filed posthearing briefs on July 7, 1981, and July 8, 1981, respectively. The Secretary filed a reply brief on July 27, 1981. Consol filed a reply brief and proposed findings of fact and proposed conclusions of law on July 27, 1981.

II. Violation Charged in Docket No. LAKE 81-67

Citation No.	Date	30 C.F.R. Standard
823213	June 9, 1980	77.405(b)

III. Witnesses and Exhibits

A. Witnesses

The Secretary called Federal mine inspector Jack A. Cologie as a witness.

Consol called as its witnesses Mr. Ted Kovalski, superintendent of the Franklin Highwall No. 65 Mine; Mr. James M. Maynard, the mine engineer at the Franklin Highwall No. 65 Mine; and Mr. Michael A. Torchik, a safety supervisor at the Franklin Highwall No. 65 Mine.

B. Exhibits

1. The Secretary introduced the following exhibits in evidence:

M-1 is a computer printout compiled by the Directorate of Assessments setting forth the history of previous violations at Consol's Franklin Highwall No. 65 Mine, beginning June 6, 1978, and ending June 5, 1980.

M-2 is a diagram of the maintenance shop where the accident occurred.

M-3 is a copy of Citation No. 823213, June 9, 1980, 30 C.F.R. § 77.405(b), and a copy of the termination thereof.

2. Consol introduced the following exhibit in evidence:

O-1 is a diagram styled "Franklin Highwall No. 65 Mine New Portal Facilities" which depicts the layout of the mine showing the office, the parking lot, and the maintenance shop where the accident occurred.

IV. Issues

A. The general question presented in the above-captioned notice of contest proceeding is whether Citation No. 823213 was validly issued pursuant to section 104(d)(1) of the 1977 Mine Act. 3/ The specific issues presented as to the citation's validity are as follows:

1. Whether the condition or practice described in Citation No. 823213 occurred.

2. If the condition or practice described in Citation No. 823213 occurred, then whether such condition or practice constituted a violation of mandatory safety standard 30 C.F.R. § 77.405(b).

3. If the condition or practice described in Citation No. 823213 occurred, and if such condition or practice constituted a violation of mandatory safety standard 30 C.F.R. § 77.405(b), then whether such violation was caused by Consol's unwarrantable failure to comply with such mandatory safety standard.

B. Two basic issues are involved in the above-captioned civil penalty proceeding: (1) did a violation of mandatory safety standard 30 C.F.R. § 77.405(b) occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

3/ Section 104(d)(1) of the 1977 Mine Act provides for the issuance of a citation when an authorized representative of the Secretary of Labor, upon any inspection of a coal or other mine, finds: (1) that there has been a violation of any mandatory health or safety standard; (2) that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard; and (3) that such violation was caused by the mine operator's unwarrantable failure to comply with such mandatory health or safety standard.

Consol's July 7, 1980, notice of contest specifically raised the issue as to whether the alleged violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. However, at the beginning of the hearing on May 1, 1981, counsel for Consol withdrew his challenge to the significant and substantial criterion by stating that he would not make it an issue. Accordingly, the Secretary was relieved of his burden of presenting a prima facie case as to such issue. See Youngstown Mines Corporation, 3 FMSHRC 1793, 1802-1803 (1981) (Cook, J.).

V. Opinion and Findings of Fact

A. Stipulations

1. Consol is the owner and operator of the Franklin Highwall No. 65 Mine located in Harrison County, Ohio (Tr. 8-10).

2. Consol and its Franklin Highwall No. 65 Mine are subject to the jurisdiction of the 1977 Mine Act (Tr. 8-10).

3. The Federal Mine Safety and Health Review Commission has jurisdiction of this case (Tr. 8-10).

4. The inspector who issued Citation No. 823213 was a duly authorized representative of the Secretary (Tr. 8-10).

5. A true and correct copy of Citation No. 823213 was properly served upon the mine operator (Tr. 8-10).

6. The alleged violation was abated in good faith (Tr. 8-10).

7. Any civil penalty assessed in Docket No. LAKE 81-67 will not affect the mine operator's ability to continue in business (Tr. 8-10).

8. The size of Consol is rated at 44,855,465 tons annually and the size of the Franklin Highwall No. 65 Mine is rated at 409,437 tons annually (Tr. 9).

B. Consol's Motion to Vacate the Citation at the Close of the Secretary's Case-in-chief

Citation No. 823213 charges Consol with a violation of mandatory safety standard 30 C.F.R. § 77.405(b) in connection with an accident which occurred at its Franklin Highwall No. 65 Mine on June 7, 1980. 4/ The citation alleges, in pertinent part, as follows:

> An accident investigation revealed that work was being performed underneath an automobile in the outside maintenance shop on June 7, 1980. The automobile was raised with an electric hoist and was not blocked before the maintenance foreman began working underneath the vehicle. Edmund Blazeski was the maintenance foreman.

(Exh. M-3).

Mandatory safety standard 30 C.F.R. § 77.405(b) requires that "[n]o work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position."

4/ The citation was issued on June 9, 1980, by Federal mine inspector Jack A. Cologie.

Consol moved to dismiss the charge of violation at the close of the Secretary's case-in-chief and set forth two grounds in support thereof. The motion was taken under advisement to be ruled upon at the time of the writing of the decision based solely upon the evidence contained in the record when the motion was made.

Neither the Rules of Procedure of the Federal Mine Safety and Health Review Commission, nor the Administrative Procedure Act, nor the 1977 Mine Act set forth express standards governing the disposition of motions to dismiss at the close of an opposing party's case-in-chief. It is therefore appropriate to consult the Federal Rules of Civil Procedure for guidance. 29 C.F.R. § 2700.1(b) (1980).

Rule 41(b) of the Federal Rules of Civil Procedure provides, in part, as follows:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

In ruling upon a Rule 41(b) motion to dismiss, the trial court is empowered to weigh the evidence, consider the law, and find for the defendant at the close of the plaintiff's case-in-chief. 5 J. MOORE, FEDERAL PRACTICE, ¶ 41.13[4] at pp. 41-189 - 41-192 (1980). The trial court may grant the defendant's motion when the plaintiff fails to present sufficient evidence during its case-in-chief to satisfy its burden of proof. See Brennan v. Sine, 495 F.2d 875 (10th Cir. 1974); Woods v. North American Rockwell Corporation, 480 F.2d 644 (10th Cir. 1973); Pittston-Luzerne Corporation v. United States, 176 F. Supp. 641 (M.D. Pa. 1959).

The Secretary proved during his case-in-chief, and I find, that on Saturday, June 7, 1980, Mr. Edmond Blazeski, the master mechanic 5/ at Consol's Franklin Highwall No. 65 Mine, used the facilities at the maintenance shop to perform work on his personal 1974 Cadillac. He had previously welded

5/ The evidence shows that a master mechanic is a high-ranking supervisory employee. According to Inspector Cologie, a master mechanic is in overall charge of maintenance and equipment with a number of workers and foremen under him. Mr. Ted Kovalski, the superintendent of the Franklin Highwall No. 65 Mine, testified during Consol's case-in-chief that a master mechanic ranks higher than a maintenance foreman. According to Mr. Kovalski, Mr. Blazeski was in charge of five maintenance foremen and 15 to 20 union people. Mr. Blazeski, in turn, reported to Mr. Kovalski.

The first argument advanced by Consol in support of its motion to dismiss the charge of violation is that the Secretary failed to adduce reliable, probative, and substantial evidence to prove that the car was not securely and properly blocked. Consol's argument is without foundation. The evidence adduced by the Secretary and the rational inferences drawn therefrom prove that at the time of the accident, Mr. Blazeski was working under the car and that it was not properly and securely blocked. Accordingly, it must be concluded that the Secretary met his burden of proof on this issue during his case-in-chief. 8/

The second argument advanced by Consol in support of its motion to dismiss the charge of violation is that the phrase "machinery or equipment" used

6/ There were no eyewitnesses to the accident (Tr. 55).

7/ The evidence presented during the Secretary's case-in-chief and the rational inferences drawn therefrom show that Mr. Blazeski was acting outside the scope of his employment duties at the time of the accident. Although not dispositve of the issues presented herein, the evidence presented during Consol's case-in-chief shows: (1) that Mr. Blazeski was off duty at the time of the accident; (2) that Mr. Blazeski was in violation of company policy at the time of the accident in that company policy prohibited the use of company facilities, supplies, or equipment for anything other than company business; and (3) that neither Mr. Kovalski, Mr. Blazeski's supervisor, nor Mr. James M. Maynard, the mine engineer, knew or had reason to know of Mr. Blazeski's unauthorized activities.

8/ There was considerable conflict in the evidence on the record as a whole as to whether suitable blocking material was present in or around the maintenance shop. Inspector Cologie testified during the Secretary's case-in-chief that a search was conducted during the Mine Safety and Health Administration's accident investigation but that no blocks suitable for blocking were found either inside or outside the maintenance shop. He reiterated this position when recalled as a rebuttal witness on behalf of the Secretary. However, Messrs. Kovalski and Torchik testified during Consol's case-in-chief that crib blocks were present at the maintenance shop.

It is unnecessary to resolve this conflict in the testimony. The evidence presented during the Secretary's case-in-chief and the evidence on the record as a whole shows that the car was not properly and securely blocked at the time of the accident. It should be noted that Consol failed to present persuasive evidence during its case-in-chief to rebut the Secretary's prima facie case on this issue.

in mandatory safety standard 30 C.F.R. § 77.405(b) does not encompass personal automobiles. According to Consol, the mandatory safety standard applies only with respect to machinery or equipment used in the operation of a coal mine. The Secretary disagrees, maintaining that the mandatory safety standard applies to any type of machinery or equipment, including personal automobiles, as long as such machinery or equipment is located on coal mine property.

Mandatory safety standard 30 C.F.R. § 77.405(b) was originally promulgated pursuant to section 101(i) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act); see 36 Fed. Reg. 9364, 9370 (May 22, 1971). 9/ The 1969 Coal Act was remedial legislation designed to secure a safe and healthful work environment for those miners working in coal mines which were subject to its provisions. See section 2 of the 1969 Coal Act. To this end, Congress set forth both a series of interim mandatory health and safety standards and procedures for the promulgation of new and improved mandatory health and safety standards. See sections 101, 201 through 206, and 301 through 317 of the 1969 Coal Act. The purpose of a mandatory safety standard was summarized on the floor of the United States Senate by Senator Harrison Williams as follows:

> To ward off the heavy toll of on-the-job fatalities and injuries, S. 2917 provides both a comprehensive set of interim safety standards and authority in the Secretary of the Interior to promulgate new and improved standards. The interim safety standards in the bill are directed at eliminating the extreme hazards of coal mining. [Emphasis added.]

LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF L969 at 244 (1975).

Although the terms "machinery" and "equipment" are not defined within Part 77 of Title 30 of the Code of Federal Regulations, it is clear that the mandatory safety standard in which they appear is propertly directed only towards the prevention of job-related injuries and fatalities. Therefore, I conclude that the phrase "machinery or equipment," as used in mandatory safety standard 30 C.F.R. § 77.405(b), encompasses only machinery or equipment used in or to be used in the operation of a coal mine. A personal automobile, such as the one involved herein and in the status it then occupied, which has no functional relationship to the operation of a coal mine is not "machinery or "equipment" within the meaning of the standard.

In view of the foregoing, I conclude that the condition or practice cited in Citation No. 823213 does not constitute a violation of mandatory

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9/ Mandatory safety standard 30 C.F.R. § 77.405(b) remains in effect as a mandatory safety standard under the 1977 Mine Act pursuant to the provisions of sections 301(b)(1) and 301(c)(2) of the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 STAT. §§ 1290-1322.

safety standard 30 C.F.R. § 77.405(b). Consol's motion to dismiss the charge of violation at the close of the Secretary's case-in-chief will be granted.

VI. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

2. Consolidation Coal Company and its Franklin Highwall No. 65 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

3. Federal mine inspector Jack A. Cologie was a duly authorized representative of the Secretary of Labor at all times relevant to these proceedings.

4. The condition or practice cited in Citation No. 823213 does not constitute a violation of mandatory safety standard 30 C.F.R. § 77.405(b).

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The parties filed the posthearing submissions identified in Part I, supra. Such submissions, insofar as they can be considered to have contained proposed findings of fact and conclusions of law have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

Accordingly, IT IS ORDERED that Consol's motion to dismiss the charge of violation at the close of the Secretary's case-in-chief be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the notice of contest in Docket No. LAKE 80-352-R be, and hereby is, GRANTED, and that Citation No. 823213 be, and hereby is, VACATED.

IT IS FURTHER ORDERED that the proposal for a penalty in Docket No. LAKE 81-67 be, and hereby is, DISMISSED.

John F. Cook
Administrative Law Judge

Distribution:

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Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RICKY RAY FERRELL, Complainant	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. VA 81-32-D
	:	No. 11 Mine
v.	:	
R & E COAL COMPANY, Respondent	:	

DECISION

Appearances: Covette Rooney, Attorney, Office of the Solicitor, U.S. Department of Labor, for Complainant; Ronald L. King, Esq., Coleman, Robertson, Cecil & King, Grundy, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 10, 1981, a hearing in the above-entitled proceeding was held on September 15, 1981, in Richlands, Virginia, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 346-364):

> This proceeding involves a Complaint of Discharge, Discrimination or Interference filed on January 19, 1981, in Docket No. VA 81-32-D, by the Secretary of Labor on behalf of Ricky Ray Ferrell, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, alleging that complainant was discharged by respondent, R & E Coal Company, on September 4, 1980, in violation of section 105(c)(1) of the Act, because Ferrell had made health and safety complaints to respondent or respondent's agent regarding conditions in the mine.
>
> I also consolidated for hearing in this proceeding the civil penalty issue which would be raised if respondent should have been found to have violated section 105(c)(1) of the Act, but my decision as to the merits of the complaint renders moot the civil penalty issue.
>
> At the commencement of the hearing, counsel for complainant and respondent entered into the following stipulations:
>
> 1. The Administrative Law Judge has jurisdiction over the subject matter of the hearing.

2. R & E Coal Corporation is a Virginia corporation engaged in the operation of a coal mine and is an operator within the meaning of section 3(d) of the Act.

3. Respondent's No. 11 Mine involved in this case produces products which enter commerce or affect commerce so that respondent is subject to the provisions of the Act.

4. Respondent has no history of a previous violation of section 105(c)(1).

5. The No. 11 Mine began operating in April 1980. Its annual production in 1980 was 83,160 tons and its annual production in 1981 is estimated to be 81,428 tons. Respondent also operates another coal mine besides the No. 11 Mine and the total annual production of both mines for 1980, and estimated annual production for 1981, total 155,895 and 159,456 tons, respectively. Those production figures support a finding that respondent operates a small coal business.

6. Complainant in this proceeding was paid $63.70 per day while he worked for respondent.

7. The parties stipulated as to the authenticity of exhibits but not to their relevance.

My decision will be based on the following findings of fact. My findings of fact are based on the composite credible testimony of all witnesses. I shall indicate in my decision why I have used parts or all of the testimony of some witnesses and have rejected parts or all of the testimony of other witnesses.

1. Complainant began working for respondent as a general inside laborer toward the end of July 1980 and worked for respondent until September 4, 1980, at which time he voluntarily left the mine between 10:00 and 11:00 a.m. after complaining about excessive dust.

2. Some background information is needed for understanding what happened on September 4 to cause complainant to leave the mine. Complainant's regular job was to remain at the tailpiece in order to clean up any coal spillage at the feeder to the conveyor belt and to stop the belt in case of a malfunction of the belt.

3. On September 4, complainant went into the mine and started the day at the tailpiece, but Justus, the mine foreman, came to the tailpiece shortly after the shift started and told complainant he would have to assist Junior Sesco, the operator of the coal drill and cutting machine, because Sesco's regular helper, Jarret Praeter, had been reassigned to be the shot fireman because an inspector had cited respondent for failing to have a certified person present when bore holes were being charged. Since Praeter was a certified shot firer, Praeter was put in charge of shooting the coal with explosives and it was, therefore, necessary to assign complainant to the position of helping the operator of the coal drill and cutting machine.

4. After complainant had assisted the operator of the drill in making 10 holes in the working face of the No. 6 entry and 10 in the adjacent crosscut, complainant told the operator of the coal drill and cutting machine that he did not like holding the drill or working in the dust which was generated by the drill. Therefore, when complainant came out of the No. 6 entry, he told Justus, the foreman, that he needed a respirator. Justus replied to complainant that respondent did not have any respirators and that complainant would have to purchase a respirator, if complainant wanted to use one.

5. Complainant returned to the drill and helped Sesco drill three holes in the No. 7 entry, at which time complainant stopped helping Sesco drill and again complained to Justus about the coal drill and the dust. Complainant asked Justus if working on the drill was going to be complainant's regular job, and Justus told complainant that helping on the drill was the only job he had for complainant at that time.

Complainant stood in the crosscut outby the No. 7 entry while Justus helped Sesco drill and cut the face of the No. 7 heading. Sesco said it took 15 minutes for him to drill the three holes in the No. 7 heading when complainant acted as his helper, and took only 10 minutes to drill the remaining seven holes with Justus, the foreman, acting as his helper.

Sesco estimated that it took 3 additional minutes to undercut the face of No. 7 heading and required 10 minutes for him, with the help of Justus, to get his cutting machine over to the No. 4 entry because of his having to get the trailing cable to the cutting machine past the roof-bolting machine. Sesco stated that Justus then told Sesco that a problem at the feeder required his attention, and Justus left Sesco at the No. 4 entry and went toward the feeder. Sesco said that complainant was still in the crosscut outby No. 7 entry when he and Justus finished drilling and cutting in the No. 7 entry, but Sesco stated that complainant did not come over to the No. 1 entry where Sesco next went. Therefore, Sesco drilled all 10 holes in that heading by himself.

Sesco learned that complainant had left the mine when Jarret Praeter, the shot firer, came to the No. 1 entry and helped Sesco undercut the No. 1 entry. Praeter had already shot the coal in the No. 7 entry before coming to the No. 1 entry. Complainant told Praeter when he left the mine on September 4, that he wouldn't drill coal for his daddy and that he was leaving.

6. When complainant left the mine on September 4, he told Bobby Coleman, the operator of the roof-bolting machine, that he was quitting. Coleman said Ferrell left before lunch, somewhere in the neighborhood of 10:30 or 11:00 a.m.

Complainant also passed Ned Taylor, the operator of the scoop, when he was leaving. Taylor said complainant held up his dinner bucket as a sign that he was leaving the mine. Taylor stated that complainant left before lunch time. Finally, when complainant left the mine on September 4, he walked past one of the owners of the mine, Robert Lester. Lester said that complainant did not tell him that complainant was leaving the

mine, even though Lester was sitting on a barrel at the time within 20 or 30 feet of the portal. Lester said that he was not aware that complainant was leaving until complainant got in the truck he drove to the mine and left. Complainant agreed that he said nothing to Lester about the fact that he was leaving or why he was leaving, although Lester was outside the mine when complainant left. Complainant stated he said nothing to Lester when he left because Lester had once said that whatever Justus, the mine foreman, said about running the mine was supported by Lester, as Justus had been put in charge of operating the mine.

7. Complainant stated that the mine foreman, Justus, placed tape over the intake of some dust pumps when they were put on some miners by an MSHA inspector. Complainant said he knew for certain Justus had put tape on the pump at complainant's position at the tailpiece, because complainant put the tape on his own pump when Justus told complainant to do so.

Justus admitted that he had taped or had had tape put on complainant's pump so as to reduce the particles going into the pump, and that he had some other miners stay out of the dust on one day so that little dust would enter the pump. Justus said he did that after the inspector told him that some pumps were used for obtaining quartz samples instead of respirable dust samples. The mine foreman had deliberately placed the pump in the dirtiest place he could find at the tailpiece after misunderstanding the inspector's instructions for obtaining quartz samples.

The inspector testified that he himself was unfamiliar with the procedure for obtaining quartz samples, and that he went to the mine on 5 days, August 25, 26 and 27, and September 2 and 3, because five different samples were required for a sampling of quartz. The inspector could not say for certain how many samples were voided by heavy particles accidentally passing into the cyclone, as opposed to the number of samples which were so light in weight as to have no validity for sampling purposes. The inspector did say that his five repeated trips to the mine on the aforesaid dates would have been necessary in any event to obtain the number of samples needed for the testing of the quartz content of the mine atmosphere.

8. Complainant also testified that during the five weeks he worked for respondent, he saw the miners haul explosives on the canopy of the cutting machine, and that the caps or detonators were not separated from the explosives at one time. Complainant said, however, that the mishandling of explosives did not contribute to his decision to leave the mine on September 4.

9. Complainant testified further that Justus did not keep curtains up at the face or maintain the mine in good condition unless an MSHA inspector happened to come to the mine. The inspector's presence at the mine would be reported to the miners underground. At that time, the miners would all stop whatever they were doing and erect curtains, apply rock dust, and do whatever was necessary to make the mine pass inspection.

Justus, the mine foreman, agreed that he was given a signal or call when an inspector was coming into the mine, and he said they did extra

work to make the mine pass inspection. But Justus denied that he ever had the miners deliberately take down curtains just to get them out of the scoop operator's way.

10. The inspector, Franklin Perkins, who took the quartz and respirable dust samples on August 25, 26, and 27, and September 2 and 3, went into the mine to check all pumps within 15 or 20 minutes after the miners went underground. The inspector also checked all pumps on at least one other occasion on each of the 5 days. The inspector wrote two citations on August 25, 1980, at 9:00 and 9:30 a.m., which are Exhibit Nos. 1 and 2 in this proceeding. The inspector wrote three citations at about 8:30 or 9:00 a.m. on August 27, 1980, which are Exhibit Nos. 3, 4 and 5 in this proceeding. Exhibit No. 3 was an unwarrantable-failure violation. The inspector thereafter wrote three unwarrantable-failure orders on September 3, 1980, between 8:00 and 9:30 a.m. which are Exhibit Nos. 6, 7, and 8 in this proceeding. Specifically, the inspector wrote three roof-control violations which were Citation No. 938172, or Exhibit No. 4, Citation No. 938173, or Exhibit No. 5, and Order No. 938176, or Exhibit No. 8. The inspector cited three violations pertaining to explosives which were Citation No. 938171, or Exhibit No. 3, Order No. 938174, or Exhibit No. 6, and Order No. 938175, or Exhibit No. 7. The inspector wrote one citation pertaining to failure to maintain brattice curtains in the Nos. 1 and 2 entries which was Citation No. 938170, or Exhibit No. 2. Finally, the inspector wrote a citation regarding a bare wire in a trailing cable which was Citation No. 938169, or Exhibit No. 1.

Complainant's credibiility was impaired for the following reasons which are not necessarily given in the order of greatest or least importance:

1. Sherman Adkins worked at R & E's No. 11 Mine while complainant was working at the mine. Adkins was a relief man and ran any item of equipment when an operator of such equipment was absent. He was complainant's brother-in-law and could be expected to support complainant's testimony, especially since Adkins had left because of a back injury and had brought suit against respondent when respondent failed to help him get unemployment compensation. Adkins, however, failed to support complainant as to a number of complainant's allegations: (a) Whereas complainant said that Justus, the mine foreman, had curtains taken down deliberately to get them out of the scoop's way, Adkins said curtains were along the rib in each entry and that Adkins never asked for curtains to be put up; also Junior Sesco, the operator of the drill and cutting machine, no longer works for respondent and had no reason to feel intimidated by telling the truth, said that curtains were in each entry and could have been installed if complainant had wanted to put up curtains. (b) Whereas complainant testified that he went out of the mine on September 4, about 2:00 p.m., and waited in Adkins' truck until Adkins left the mine at the end of the shift, Adkins testified that he was sick with a back injury and was not at the mine on September 4 and that complainant had driven Adkins' truck to the mine on September 4. (c) Whereas complainant said he left the mine about 2:00 p.m. on September 4, all other miners who saw complainant leave, including the scoop operator,

bolting-machine operator, and part owner of the mine, testified that complainant left well before noon on September 4 and the owner of the mine said complainant got in his truck and left immediately without waiting for anyone.

2. Complainant testified that the MSHA inspector who placed the pumps on the miners on August 25 and 26 stayed out of the mine all day on August 25 and 26, whereas the inspector testified he checked the pumps at least twice by going underground to check the pumps and make an inspection of the working face. The citations and orders written by the inspector on August 25 and 27 and September 3, and described in Finding No. 10 above, show beyond any doubt that the inspector was underground checking the pumps on all 5 days he was at the mine to collect samples.

3. Although complainant stated that another miner stopped working on the drill because of dust, complainant could not give the miner's first or last name. The preponderance of the evidence shows that the man whose place the complainant took on the drill was transferred to the position of certified shot firer and that no one left the position of helper to the operator of the drill because of dusty conditions.

4. Complainant stated that the curtains were deliberately taken down in all entries and piled up in the return entry three crosscuts outby the working face. That testimony was disputed by Adkins, complainant's brother-in-law, and by Junior Sesco, both of whom testified that the curtains were lying along the rib in the headings if the miners wanted to use them. Also, since the tailpiece was situatiod only two crosscuts from the working face, there would have been no need or reason to carry the curtains three breaks or crosscuts outby the face.

5. Complainant testified that he helped drill 10 holes in the No. 5 heading and 10 in the crosscut at No. 5. He said it took 2 minutes per hole, so that would be 40 minutes plus time required for undercutting. Complainant also said he drilled 10 holes in the No. 6 heading which would have taken 20 minutes plus time for undercutting and that he helped drill seven holes in the No. 7 heading which would have required 14 minutes. Therefore, drilling time amounted to 40 minutes plus 20 minutes plus 14 minutes, or 1 hour and 14 minutes plus time for undercutting. Sesco stated that only 3 minutes were required to undercut the No. 7 heading, so even if one adds 30 minutes for undercutting in No. 5 heading and the crosscut and in Nos. 6 and 7 headings, complainant would have worked on the drill for 1 hour and 45 minutes, whereas complainant testified that he worked on the drill for 3-1/2 or 4 hours on September 4.

6. Complainant testified he drilled in the No. 5 heading and the break at No. 5 and then in the No. 6 heading and seven holes in the No. 7 heading, whereas both Praeter and Sesco stated that they had already drilled in the No. 5 heading and the break at No. 5 before complainant started helping. Sesco's recollection of having to get assistance from Justus to finish drilling in the No. 7 entry and his taking the cutting machine to the No. 4 entry with the help of Justus and about Justus

having to go to the feeder shows that Sesco's recollection was vivid and contained sufficient details to support my conclusion that Sesco's version of the drilling sequence is more credible than complainant's recollection of the facts.

7. Complainant testified that Justus, the mine foreman, told him on September 4, after he had complained about dust for the second time, that he would have to drill coal or else, whereas Sesco, the operator of the coal drill, testified that Justus told complainant that he would have to drill coal on September 4 because that was the job which had to be done on that day in view of the fact that Praeter had been transferred from the position of helping to drill coal to the position of shot firer. I believe that Sesco's version is more credible than complainant's version because in his complaint filed with MSHA, complainant stated that he asked Justus if the position of helper on the coal drill was going to be complainant's regular job. A reply to that question by Justus to the effect that the helper to the operator of the coal drill was the only job he had for complainant that day is a more likely reply to the question which the complainant says he asked than the complainant's allegation that Justus told complainant he would have to drill coal or else.

In Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), the Commission held that a miner has a right under the Act to refuse to work in a hazardous condition. 1/ The Commission stated that the miner has established a prima-facie case if he shows that he was engaged in a protected activity and that the act of discharge or discrimination was motivated in any part by the protected activity. The Commission said that it is respondent's burden to show, if the miner makes out a prima-facie case, by a preponderance of evidence that the adverse action would have been taken in any event for the unprotected activity alone. In Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981), the Commission extended its holding in Pasula as to the miner's right to refuse to work in hazardous conditions by ruling that a miner may engage in affirmative action to abate the hazardous condition which caused him to refuse to work.

The evidence in this proceeding shows beyond any doubt, particularly as set out in Finding Nos. 5 and 6 above, that complainant refused to drill coal on September 4. Under the Pasula case, complainant was engaged in a protected activity when he refused to continue drilling coal. One of the witnesses called by the complainant in this proceeding was Junior Sesco, the operator of the coal drill and cutting machine on September 4. Sesco had to take his wife to the hospital on the day of the hearing in this proceeding. Before Sesco had testified, I denied a motion by respondent's counsel for dismissal of the complaint for failure to prove a violation of section 105(c)(1). After respondent had presented two of its witnesses, respondent's case was interrupted so that complainant's final witness, Sesco, could be presented. If Sesco's testimony had been in the record when respondent's counsel made his motion to dismiss,

1/ Reversed on other grounds, No. 80-2600 (3d Cir. Oct. 30. 1981).

I would have been very doubtful that complainant had proven a prima-facie case, or that the alleged discrimination involved in this proceeding had occurred, because Sesco's testimony was devastating to complainant's contention that he was told he had to drill coal in dusty conditions without being provided with curtains or any other type of relief.

Although Sesco's testimony supports complainant's allegation that Justus told the complainant he would have to purchase his own respirator, Sesco's testimony rebuts complainant's contentions by showing that Justus did not object to complainant's hanging a curtain and that Justus did not tell complainant that he would have to drill coal in unmitigated dusty conditions or else. Instead, Sesco testified that Justus only stated that he could not offer the complainant an alternate job on September 4 in answer to the complainant's question as to whether his regular job in the mine would continue to be as helper to the operator of the coal drill and cutting machine.

The complainant, from the filing of his initial complaint with MSHA to the conclusion of this hearing, had a very tenuous case at best because his only hope of showing a violation of section 105(c)(1) was to establish that he was told that his complaint about dust would in no way be mitigated and that he would either work in dust or else -- which for the purposes of this case must be interpreted to mean that he would be discharged if he either tried to engage in affirmative action by erecting a brattice curtain or insisted that repondent provide him with a respirator.

I believe that Justus' testimony in this proceeding has a rather low credibility rating because nearly all the witnesses testified that he failed to make them put up curtains when they were working in a heading, whereas Justus stated that he made the miners hang curtains when he saw them working without curtains. The miners had no reason to say that they weren't using curtains if, in fact, they were. Also one of the inspector's citations (Exhibit No. 2) issued on August 25, 1980, was for failure of respondent to use brattice curtains in all entries. Moreover, Sesco's testimony and that of the part owner, Robert Lester, show that Justus made no attempt to get a respirator by going outside for one until after the complainant had already left the mine. Under Sesco's testimony, Justus helped Sesco drill and undercut and move the cutting machine for at least 23 minutes before Justus went to check the feeder. The complainant did not leave for at least 28 minutes after asking Justus for the respirator. Thus, if Justus had actually told the complainant he would go outside for a respirator, he could have gone out and been back in the mine with a respirator before complainant left the mine. Therefore, the preponderance of the evidence supports the complainant's contention that Justus refused even to try obtaining a respirator for complainant.

Nevertheless, Sesco's testimony established that Justus did not threaten to discharge complainant for asking about the use of curtains, assuming complainant really did press Justus for permission to use curtains. Adkins had left respondent's mine after an injury and had sued respondent for some compensation. Therefore, Adkins would have had no reason to fail to support complainant's case, especially since Adkins

was complainant's brother-in-law, but Adkins' testimony also shows that the miners had no need to fear using curtains if they wished to do so and that the curtains were left lying in the entries if they were knocked down by the scoop.

For the foregoing reasons, I find that while complainant was engaged in a protected activity when he asked for a respirator to work in a dusty or unhealthful environment, he failed to prove that he would have been discharged for asking for the respirator or for hanging a curtain to alleviate the dust while he was helping to operate the coal drill.

The complainant does not even allege that he was discharged; at most, his case depended on his being able to prove that he had to drill coal in an unmitigated dusty condition or be discharged. His evidence simply does not rise to that height of proof which is necessary for him to prove that respondent violated section 105(c)(1) when complainant left the mine on September 4.

I find that the preponderance of the evidence shows that the complainant did not like to help operate the coal drill in the first instance. Part of complainant's dislike for the coal drill may well have been Sesco's fault for using a dull bit longer than he should have because Sesco stated that it took him and complainant 5 minutes to drill each of the three holes which complainant helped Sesco drill in the No. 7 entry, or a total of 15 minutes, whereas after Justus started helping Sesco in the No. 7 entry, Sesco and Justus drilled seven holes in 10 minutes or about 1-1/2 minutes per hole. Consequently, there were many aspects of working on the coal drill which were not to complainant's liking. When complainant left on September 4, he told Praeter that he wouldn't drill coal for his daddy, but he failed to state to anyone on September 4 that he was forced to leave or be fired for failure to drill coal in a dusty environment. Therefore, the evidence simply does not prove that complainant was discharged for making a health or safety complaint.

WHEREFORE, it is ordered:

The Complaint of Discharge, Discrimination, or Interference filed on January 19, 1981, in Docket No. VA 81-32-D is denied for failure to prove that a violation of section 105(c)(1) occurred.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. VA 81-51-M
Petitioner	:	A.O. No. 44-03995-05007F
v.	:	
	:	Culpepper Plant
A. H. SMITH STONE,	:	
Respondent	:	

DECISION

Appearances: David T. Bush, Attorney, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the petitioner;
Wheeler Green, Safety Director, A. H. Smith Stone, Branchville, Maryland, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged violation pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceeding and a hearing was held on November 5, 1981, in Falls Church, Virginia, and the parties appeared and participated therein. The parties waived the filing of posthearing proposed findings and conclusions, but were afforded the opportunity to make arguments on the record and those have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

4. 30 C.F.R. § 56.4-35 provides as follows: "Mandatory. Before any heat is applied to pipelines or containers which have contained flammable or combustible substances, they shall be drained, ventilated, thoroughly cleaned of residual substances and filled with either an inert gas or, where compatible, filled with water."

Stipulations

The parties stipulated to the following:

1. A. H. Smith Stone owns and operates the Culpeper Plant.

2. A. H. Smith Stone and the Culpeper Plant are subject to the Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this proceeding.

4. Citation No. 309243 was properly served upon A. H. Smith Stone by Carl Liddeke and may be admitted into evidence to show its issuance and not for the relevancy or truthfulness of the statements contained therein.

5. The size of A. H. Smith Stone is as follows: 167,966 annual production tonnage; 17,462 annual production tonnage for the Culpeper Plant.

6. Prior to the issuance of the subject citation, the operator had a history of eight assessed violations.

Discussion

Citation No. 309243, November 26, 1980, alleged the following:

> An employee was critically injured on November 24, 1980, at about 1:53 p.m. by an explosion and resulting fire when he

attempted to cut a fifty-five gallon oil drum with a Victor C-1400 cutting torch. The oil drum had contained Exxon XD3-30 engine lubricating oil, but was considered empty. The fill plugs had not been purged of fumes or filled with an inert gas or water.

Action to terminate: "All employees were instructed in the proper procedures to use when cutting or welding containers that have had flammable liquids."

Testimony and Evidence adduced by Petitioner

MSHA inspector Carl W. Liddeke testified that he issued the citation in question after he conducted an investigation on November 25, 1980, the day after the accident. He spoke with employee Henry K. Nicholson and Superintendent Lonnie Fields about the accident. He observed a 55-gallon oil drum that had the bottom blown out of it. It appeared that the drum had exploded when a cutting torch had been applied to it. Mr. Liddeke stated that Mr. Fields had told him that he was unaware of any permission given to an employee to cut the drum. Since Mr. Fields also stated that he had no knowledge that the injured employee, actaully cut the drum, he determined that there was no negligence. Mr. Liddeke then testified that his opinion had changed regarding the operator's degree of negligence, since subsequent to his investigation, he received conflicting statements from the victim's wife (Rachael Morton) regarding krowledge on the part of the operator. Mr. Fields had told him that employees frequently took barrels for their own use, and Mr. Liddeke stated that the barrels are normally emptied and stored without being purged (Tr. 17-30).

On cross-examination, Mr. Liddeke stated that the respondent was negligent because the accident happened on company property during working hours. He also testified that he knew from the conversations he had with the employees that the company had cut oil drums, but he did not know whether any instructions for cutting the barrels had been given to the employees (Tr. 30-31, 53-54).

In response to bench questioning, Mr. Liddeke stated that the employees could have the barrels by merely asking for them. Mrs. Morton had learned from Mr. Fields that her husband had asked for the barrel which later exploded. He testified that normally the barrels are not purged of liquid before they are stored, and he confirmed that the only barrel he examined and tested was the one Mr. Morton had tried to cut. He determined that an explodable liquid was present since the barrel ignited when a torch was applied to it. He felt that if the barrel had been purged of the flammable liquid, it would not have exploded. Furthermore, part of the barrel had been sent to a state laboratory which showed that a petroleum distillate-type material was present (Exh. ALJ-1; Tr. 31-37).

Mr. Liddeke testified that Mr. Morton intended to use the barrel as an oil-drain pan for his personal tractor, and that Mr. Fields told him that

sometimes barrels were used to transport diesel fuel to vehicles. Also, they often were cut and used as garbage cans, but Mr. Liddeke could not recall seeing these barrels used in these ways (Tr. 38-49).

Henry K. Nicholson, who was a loader operator at A. H. Smith Stone at the time of the accident, testified that he is presently employed as a correction officer by the State of Virginia. He had been an employee of A. H. Smith Stone for 3 years and on the day of the accident he was using a welder and a torch to construct a rack on which to store tools. Mr. Nicholson testified that Mr. Morton came to him in his work trailer to ask whether he could use a torch later on that day to cut a barrel so that he could drain oil at his house. Mr. Nicholson stated that Mr. Fields would let employees have these barrels if they asked for them. Mr. Morton had always asked permission to take the barrels and Mr. Nicholson remembered seeing him use a torch on them in the past. After obtaining permission, Mr. Morton returned to the trailer and took the torch. Mr. Nicholson stated that the next thing he heard was an explosion and then he saw Mr. Morton on fire. Looking at the barrel afterwards, he could tell that a torch had been applied to it (Tr. 54-58, 59-60).

On cross-examination, Mr. Nicholson testified that Mr. Fields had instructed the employees as to how barrels should be cut. Plugs were to be taken out and the barrels allowed to ventilate, after which they should be filled with water and rinsed out. After this procedure was completed, if the barrels were to be used as trash cans, they could be torched. Mr. Nicholson stated that the barrel which exploded still had a plug in it, so no air could get in. He also indicated that the normal storage area for barrels was behind the trailer. The antifreeze barrels were returnable but he was not sure whether the Exxon barrels were returnable. Sometimes empty oil drums were refilled to transport fuel. The barrel that exploded had contained Exxon motor oil for the loaders and dozers (Tr. 58-59, 60-63).

Mrs. Rachel Morton, wife of the accident victim, testified that her husband had taken company barrels before and used a torch on them. She stated that she spoke with Mr. Fields in the hospital on Thanksgiving Day and he had told her that her husband had asked specifically for the barrel and that Mr. Fields told him that he could use a torch on it as long as it would not interfere with Henry Nicholson's job. Mrs. Morton stated further that during her hospital visit she repeatedly asked her husband whether he had asked permission to take a barrel and cut it with a torch. Although he could not speak at the time, he nodded affirmatively. Her husband also indicated that he had checked to see whether anything was in the barrel (Tr. 63-67).

On cross-examination, Mrs. Morton testified that Mr. Morton brought the barrels home for various uses. She knew that he always asked Mr. Fields for them,and had observed Mr. Morton cut these barrels at home (Tr. 67-69).

Ms. Sarah C. Honenberger testified that she was retained by Mrs. Morton to determine whether she was entitled to any insurance or workmen's compensation benefits as a result of Mr. Morton's death after the accident in

question. She stated that Mrs. Morton has received all available benefits and has no present claims against the company. She testified that she had spoken with Mr. Fields regarding the circumstances surrounding the accident in order to know how the company would report it to the state industrial commission. Mr. Fields stated that Mr. Morton had asked for a barrel to take home as this was his usual practice. After the accident, Mr. Nicholson advised him that Mr. Morton had borrowed his welding torch (Tr. 70-73).

On cross-examination, Ms. Honenberger testified that she did not recall Mr. Fields stating that he specifically told Mr. Morton to use a cutting torch on the barrel. The only purpose of her conversation with Mr. Fields was to determine whether Mr. Morton's activities were work-related (Tr. 73-74).

Testimony and Evidence Adduced by Respondent

Lonnie Fields, superintendent at A. H. Smith Stone at the time of the accident, testified that Mr. Morton had asked permission to take the barrel in qeustion, and he assumed Mr. Morton would take it home. Mr. Morton did not ask to use the torch although he had used it before. Mr. Fields stated that he had no knowledge that Mr. Morton was going to use the torch, but he had instructed him in the past on torching barrels, telling him to remove the plugs and to cheak whether anything remained inside. This was part of A. H. Smith Stone's regular safety program in which all regulations were discussed. Mr. Fields indicated that the employees knew that Exxon takes back empty drums (Tr. 75-82).

On cross-examination, Mr. Fields stated that there was no doubt Mr. Morton had used a torch on the barrel on the day in question as he had used a torch on them in the past. On this particular day, however, Mr. Fields assumed that he was taking the barrel home with him for his own use. Mr. Fields gave him no instructions to cut it for some specific purpose, and he admitted that he would probably have given Mr. Morton permission to cut the barrel on company time since Mr. Morton had always taken proper safeguards and purged the barrels. Mr. Fields indicated that all the barrels were stored outside in a trailer. He stated that the empty drums still had the plugs in because they were returnable and the company wanted the used ones (Tr. 83-90).

Findings and Conclusions

Fact of Violation

Upon examining the evidence of record and considering the testimony elicited at the hearing, I have made the following factual conclusions regarding the events leading to the accident of November 24, 1980. Mr. Morton asked Mr. Fields for one of the empty Exxon oil barrels which were stored behind the trailer waiting to be picked up by the oil company. It was Mr. Fields' practice to allow the barrels to be taken by the employees if they asked permission for them. On this particular day, Mr. Fields assumed

that Mr. Morton would take the barrel home for his personal use. After asking for the barrel, Mr. Morton then obtained a torch from Mr. Nicholson. Mr. Nicholson had seen Mr. Morton use a torch on the barrels before. Mr. Morton then took the torch outside, applied it to the barrel, and caused an explosion which resulted in fatal injuries. The explosion was the result of a flammable liquid which was in the barrel, and the investigation after the accident indicated that the plug in the barrel had not been removed and the barrel had not been ventilated or rinsed out.

The employees at A. H. Smith Stone were sometimes ordered to cut the barrels with a torch to make trash cans for the company's property. The employees had been instructed in the proper procedure for purging the barrels. They were supposed to take the plug out of the barrel and allow it to ventilate. After it was rinsed out with water, it could be torched.

There is no question that a violation of 30 C.F.R. § 56.4-35 took place. The evidence indicates that Mr. Morton applied a torch to a container which had contained combustible or flammable oil without draining, ventilating, and cleaning the barrel. After the explosion, the barrel was examined revealing that the plug was still intact. An examination of the plug revealed a residue of the fuel oil which had been in the barrel (Exh. ALJ-1). All the parties agree that the barrel would not have exploded if it had been properly cleaned and drained. Accordingly, there was a violation of the cited mandatory safety standard and the citation is AFFIRMED.

Gravity

The presence of empty oil drums which contained residue of the oil, together with a practice of using cut-off drums as garbage cans, presented a hazardous situation since torches were used on the drums. As indicated here, the danger is extremely serious, since an explosion is likely to result when a torch is applied to an unclean barrel. Here, Mr. Morton suffered serious burns which eventually led to his death. Accordingly, I find this violation to be very serious.

Negligence

The inspector originally made a finding of no negligence because the oil drum was cut without the operator's knowledge. At the hearing, MSHA counsel stated that based on newly uncovered evidence, it was revealed that the operator was negligent and this negligence resulted in the accident and death of Mr. Morton.

The facts in this case indicate that the barrels were stored in an accessible location near the trailer on the property. Although these empty barrels were returnable and sometimes picked up by the oil company, it was not an unusual practice for the barrels to be taken by the employees or used on the property. Management was liberal in granting permission to take these empty barrels. Management had also in the past instructed employees to cut the barrels into trash cans by using a torch. The employees had been told to

take the plugs out of the barrels and to ventilate them before cutting them. Therefore, it was not unforeseeable that an employee who asked permission for a barrel might use a torch on it. In fact, Mr. Fields stated that he probably would have given permission to Mr. Morton to cut the drum on company time (Tr. 87). It is fair to assume then that the operator knew or should have known that there was a likelihood that Mr. Morton would use a torch on the oil drum in question.

Respondent has raised the argument that since Mr. Morton was negligent in not removing the plugs from the oil drum prior to applying the torch, the operator should not have been found negligent. This is based on the premise that since the employees had been instructed in the proper and safe way to purge a barrel before torching it, the operator had fulfilled its reponsibility.

I conclude that respondent knew or should have known of the possibility of an employee using a torch on a barrel before purging it. See Secretary of Labor v. Heldenfels Brothers, Inc., 2 FMSHRC 851 (1980). I find that the events of November 24, 1980, were highly foreseeable because employees often took barrels, and using torches on them was not an uncommon practice. Knowing this, respondent should have taken extra precautions to insure that all barrels were purged. Since the consequences of an employee putting a torch to a barrel containing oil residue could predictably result in an explosion resulting in serious or fatal injuries to one or more people, the duty of the operator is much greater. While Respondent did attempt to instruct the employees as to the proper procedure for purging barrels, management could have been more diligent in its attempts to insure that all barrels were properly ventilated and cleaned. It could have required that every barrel be ventilated and cleaned as soon as they were empty and before they were stored behind the trailer. By not doing so, the operator took the risk that someone might torch a barrel before taking all the necessary steps to clean it. Mr. Morton's conduct was "not aberrational or unforeseeable, but ordinary human error that stemmed from a lack of safety consciousness." See Secretary of Labor v. Warner Company, 2 FMSHRC 972, 973 (1980). Accordingly, I conclude and find that the respondent was negligent for not foreseeing Mr. Morton's conduct and taking action to prevent a possible accident.

This situation is not analogous to the facts of Secretary of Labor v. Nacco Mining Company, 3 FMSHRC 848. There the Commission found the operator not negligent for the acts of the foreman where the foreman proceeded alone past the last row of permanent supports under loose, unsupported roof where a large rock fell on him causing the injuries from which he later died. The Commission ruled that "where an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforeseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for 'negligence.'" 3 FMSHRC at 850. But here the employee's conduct and subsequent accident were foreseeable and I have found that the operator did not take all reasonable steps to insure that the barrels were properly drained and cleaned. Therefore, the operator was negligent.

In considering the degree of negligence to be imposed for this violaion, I have taken into account the fact that the operator had instructed the employees in the proper cleaning procedures. While these efforts were inadequate to fulfill the operator's duty of care for avoiding an accident, I cannot conclude that the record in this case supports a finding that the operator was grossly negligent. I find that the operator did not exercise reckless disregard of mandatory health and safety standards or recklessly or deliberately fail to correct an unsafe condition or practice which was known to exist.

Good Faith Compliance

On the facts of this case it is clear that abatement took place by means of the post-accident instructions to all employees concerning the proper procedures and safeguards when cutting or welding containers that have contained flammable or combustible materials. Inspector Liddeke found that the violation was abated within a reasonable time and the respondent complied with the instructional requirements of the abatement. Thus, it is clear that the respondent exhibited good faith in the abatement requirements imposed by the inspector. However, some comment is in order with regard to the language of section 56.4-35, and these follow below.

In my view, the inspector should have considered requiring the respondent to purge all empty oil drums which remained in storage on respondent's property after the accident in question so as to preclude another unfortunate accident. Hopefully, as a result of this incident, the respondent will insure that steps are taken to purge all such oil drums so as to render them safe while in storage or awaiting shipment to the supplier. Further, I suggest that MSHA consider the possibility of amending the standard to specifically require that all such flammable containers be purged and rendered safe. The regulatory language "[B]efore any heat is applied" leaves much to the imagination and whim of any employee who may put a torch to an oil drum which may or may not have been purged of flammable or combustible residue. By requiring this to be done as soon as the drum is empty and stored on company property where it is readily available to anyone would eliminate any uncertainty.

History of Prior Violations

The parties stipulated that prior to the issuance of the subject citation, the operator had a history of eight violations. This indicates that respondent has a good record with respect to safety and I have considered this in assessing a civil penalty.

Size of Business and Effect of Penalty on the Respondent's Ability to Remain in Business

The parties stipulated that A. H. Smith Stone produces 167,966 annual tons and 17,462 tons is produced at the Culpepper Plant. I find that this is a small operation and that fact is reflected in the penalty assessed. The penalty will not adversely affect its ability to remain in business.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a penalty assessment in the amount of $1,000 is reasonable and appropriate for the citation which I have affirmed, and the respondent IS ORDERED to pay the assessed penalty within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

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DEC 30 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 81-61
	:	Assessment Control No. 44-01519-03025 V
v.	:	
	:	No. 3 Mine
HARMAN MINING COMPANY, Respondent	:	

DECISION

Appearances: Covette Rooney, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner; Robert M. Richardson, Esq., Richardson, Kemper, Hancock & Davis, Bluefield, West Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 10, 1981, a hearing in the above-entitled proceeding was held on September 16, 1981, in Richlands, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 106-127):

> This proceeding involves a petition for assessment of civil penalty filed in Docket No. VA 81-61 on June 23, 1981, by the Secretary of Labor, seeking to have a civil penalty assessed for a violation of 30 C.F.R. § 75.316 by Harman Mining Company.
>
> The issues in civil penalty cases are whether a violation occurred and, if so, what civil penalty should be assessed based on the six criteria which are set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.
>
> In order to determine whether a violation has occurred, I must first make some findings of fact, which will be set forth in enumerated paragraphs.
>
> 1. On January 26, 1981, Inspector Larry Clevinger made an examination of the No. 3 Mine of Harman Mining Company, Incorporated. At that time he wrote Citation No. 939522 under section 104(d)(1) of the Act citing a violation of section 75.316, and stating that the ventilation system, methane and dust control plan was not being complied with and that the line brattice was not being maintained from the last open crosscut to within 10 feet of the face of the Nos. 1, 2, 3, and 4 entries; and that the check curtains were not installed in the Nos. 1, 2, 3, and 4 entries.

2. The inspector introduced as Exhibit 4A a diagram which showed the distances which various entries had been driven without there having been erected line brattices. Those distances range from 115 feet maximum to 80 feet minimum in the Nos. 2 and 1 entries, respectively. There were also some crosscuts to the left of the Nos. 4, 3, and 2 entries, which were 20, 45, and 30 feet in depth, respectively. The inspector introduced as Exhibit 4B a diagram of that same area and those same distances, on which he had drawn the brattice curtains which should have been erected, if the ventilation plan had been followed.

3. The inspector stated specifically that the portion of the ventilation plan which was not complied with was paragraph 12 on page four of the plan, which is Exhibit 3 in this proceeding. The first sentence in that paragraph states: "Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut in each working place of the working section." The inspector stated that was the provision that he specifically had in mind when he alleged the violation in Citation No. 939522.

4. The inspector defended his citing or issuing the citation under section 104(d)(1) of the Act by pointing out that prior to the time the Commission's decision was issued in MSHA v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), he used criteria under which he wrote unwarrantable failure orders and citations, based on a decision issued by the former Board of Mine Operations Appeals after the Board had been reversed by a circuit court. After reversal, the Board held that the term, "significant and substantial," which has to be found as to a given violation before a citation can be issued under section 104(d), needs to involve no more than a remote or speculative possibility that an injury might occur. The inspector indicated that a violation did not have to be very serious at all in order to be considered a "significant and substantial" violation under the criteria he was then following.

In the Commission's decision in the National Gypsum case that I just cited, the Commission stated that it believed that the previous criteria for finding a violation to be significant and substantial had been so broadly defined that the words had lost their basic meaning. The Commission stated on page 828 of its decision that " * * * [o]ur interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes -- mere existence of a violation, and existence of imminent danger, the latter of which contains elements of both likelihood and gravity."

5. The inspector in this case at first said that the holding of the Commission in National Gypsum Company caused him to have some doubt as to whether his citation would have been issued, if he had been following the Commission's new criteria for establishing whether a violation is significant and substantial, but after considerable reflection on the

matter, he concluded that he believed that failure to have the curtains continuously maintained in the four entries was sufficient to be a reasonable likelihood of injury or illness and that if it occurred, it would have been of a reasonably serious nature. Consequently, he reaffirmed his belief that his unwarrantable failure citation should have been issued. He also explained that he had made the other findings required, namely, that a violation had occurred, that it was not an imminent danger, that it was significant and substantial, and finally that an unwarrantable failure had occurred.

6. The respondent in this proceeding has presented three witnesses who have testified that the reason that the company was having difficulty with keeping line curtains in the entries described in the inspector's citation was that they had been mining in a coal seam with heights of 9 to 10 feet, including a rock seam in the middle. They then encountered a rock seam that was so thick they couldn't mine it with the coal and did not want to cut it down. Consequently, they went under the rock portion which had the effect of reducing the mine height from a 9 or 10-foot height down to 50 or 54 inches. Also, in order to improve the stability of the roof, the company narrowed the entries from about 20 feet to 14 to 18 feet. This particular block of coal was approximately 120 feet long, and it only took the company about 5 days to mine completely through it, at which time they resumed mining at the normal height and returned to the normal 20-foot width for entries.

7. The witnesses for respondent stated that during the period when their entries were narrow, the inspector had inspected the mine and had issued his citation about 2 days after they had started into the above-described low area with the narrow width in the entries and that their equipment measured 10 feet 6 inches in width, and it was almost impossible to keep a brattice curtain up at the same time the equipment was operating in the entries. That accounted for the fact that the curtains had not been hung on January 26 when they were cited by the inspector.

8. There were some stipulations entered into by the parties. It was stipulated that the No. 3 Mine is owned and operated by Harman Mining Company and that Harman Mining Company is subject to the Act; that I have jurisdiction to hold this hearing and decide the case; that the citation was duly issued by an authorized representative of the Secretary; that the assessment of a civil penalty would not cause respondent to discontinue in business; and that insofar as the size of the company is concerned, the annual production for the total company is 265,134 tons and for the No. 3 Mine, production is 103,716 tons annually.

It was also stipulated that the company showed a good-faith effort to achieve compliance after the citation was issued, and that the No. 3 Mine had 54 previous violations during the 24 months preceding the issuance of the citation involved in this case. There was some additional testimony by one of respondent's witnesses, Mr. Hurley, to the effect that there were a large number of inspection days at the mine and that if you took that into consideration, the company had a very low ratio of violations to inspection days.

9. Mr. Hurley also introduced as Exhibit B a sheet printed by MSHA's computer. That exhibit reflects that during January of 1981 the company was within compliance with the respirable dust standard by having an average concentration of 1.8 milligrams per cubic meter of air.

10. It was stated by Mr. Owens, one of respondent's witnesses, that he was in this mine on Thursday, January 22, 1981, when the company first began to mine the narrow entries and go to the lower height than was normal. This particular Exhibit B shows that on that day a respirable dust sample for the cutting machine operator's environment showed a concentration of 1.4 milligrams per cubic meter.

The first issue to be considered is whether a violation occurred. We don't have any real problem with making a finding as to whether the violation occurred, because everybody concedes that the curtains weren't up on January 26 when the inspector wrote this citation at 8:15 a.m. Everybody concedes that the ventilation plan required them to be maintained continuously; therefore, I find that a violation of section 75.316 occurred. While in a normal civil penalty case, an issue or issues concerning the validity of the inspector's citation or order is not normally a matter to be considered, I held in this case that it was permissible for respondent to go into the matters of whether the citation had been validly issued under Section 104(d)(1) because I interpreted the Commission's National Gypsum decision as indicating that a respondent may raise matters concerning the validity of citations and orders in a civil penalty proceeding under the 1977 Act.

It is true, as Ms. Rooney has pointed out in her argument, that the Commission agreed with the former Board that when a civil penalty case arising under the 1969 Act had been set for hearing and was in progress, that it was not permissible for respondent to raise issues as to the validity of the citation or order, because the only issues in a civil penalty proceeding are whether a violation occurred and, if so, what penalty should be assessed. The reason that the former Board held that you could not go into the merits of the issuance of a citation or order in a civil penalty case was that the 1969 Act very clearly provided for review of citations, which were then called notices of violation, and orders as a separate matter; whereas, in the 1977 Act, the provision for review of the merits of a citation or order are not really very clearly set forth in the Act because it appears that under the language in section 105(d) of the Act, a respondent might take the position as to civil penalty issues that he would not seek review by means of a notice of contest and would, instead, await the occurrence of a proceeding under the civil penalty aspect of the Act, at which time he would raise issues both as to the merits of the citation or order being considered in the civil penalty case, as well as the issue of whether a violation occurred and what penalty should be assessed.

Consequently, I believe that the Commission has opened the door to allow an operator to raise issues as to the validity of a citation or order in a civil penalty case. I believe that is the result of the Commission's consideration in the National Gypsum Company of the criteria

for making "significant and substantial" findings because that case was not a notice of contest case, but arose as an ordinary civil penalty case. 1/

Now that I have so ruled it is necessary for me to consider whether the inspector properly issued an unwarrantable failure citation in this instance. We don't have any problem with the first part of the inspector's finding as to a 104(d)(1) citation because we have already agreed that a violation occurred. Nobody has felt that the violation approached anything like an imminent danger, so we don't have any problem with finding that the violation did not constitute imminent danger. We do have a problem when we go to the language of section 104(d)(1) which provides that an inspector must also find " * * * that such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

As I already pointed out in my findings above, the Commission held in the National Gypsum case that the words "significantly and substantially" should be applied so as to determine whether there was a reasonable likelihood of an injury or illness which would have been of a reasonably serious nature.

The respondent in this case has argued very strenuously that the mere fact that these brattice curtains were not up at the beginning of the working shift on Monday, January 26, cannot possibly be found to be significant and substantial within the meaning of the Commission's test, because, according to the inspector, there was only a roof-bolting machine in the actual working section or in any of these entries where the brattice curtains had not been erected, but there were other pieces of energized equipment outby such entries. Respondent contends that since there was almost no likelihood of any ignition occurring and since the mine generated only from .01 to .02 of 1 per cent of methane, even when analyzed in a bottle sample, that the likelihood of any explosive quantity of methane occurring was so remote that it would be a misuse of the Commission's test to say that leaving these brattice curtains down at a time like that -- that is, when there was no activity in the entries and no production going on -- would contribute to a mine safety or health hazard.

The Government, of course, has argued that even though at the moment the inspector issued Citation No. 939522, there was only a minute quantity of methane in the mine; that when you have a mine which has the possibility or the potential of liberating methane, that there is also the possibility that an explosive quantity of methane could accumulate in the inadequately ventilated entries. Consequently, if any kind of spark should have come from any of this equipment while these curtains were not up, that an explosion could have occurred. Of course, if it should have occurred, it could have had serious consequences.

1/ A further statement of the reasons for my belief that an operator may obtain review of the validity of a citation, as opposed to an order, in a civil penalty proceeding is set forth at the end of my bench decision.

As to that part of the argument, I think that I shall have to go along with the Government's contentions. In Reliable Coal Corp. v. Morton, 478 F.2d 257 (4th Cir. 1973), the court held that Congress has done away with the gaseous and nongaseous distinction in coal mines. That case shows that we must assume under both the '77 and '69 Acts that all coal mines are to be considered gaseous.

Despite the court's holding in the Reliable case, we still look at the actual amount of methane which exists in any given situation and if we find that there is no presence of methane, or if a mine above the water table is involved and has never liberated methane, we still in a case citing a violation of a ventilation provision, we hold that that is a less serious violation than one which occurs in a mine which does liberate large quantities of methane. But be that as it may, the liberation of methane is unpredictable. Methane has been known to be found and accidents have occurred in mines which have no prior history of liberating methane. Consequently, I think I shall have to go along with the Government and find that the possibility exists that a large accumulation of methane could occur, and the fact that an explosion can occur in these situations, requires me to find that the inspector was correct when he said that there was a reasonable likelihood of an injury from the fact that these curtains were not up and that a reasonably serious injury could have occurred as a result of that explosion, if it had occurred.

Now, we have also an argument here by respondent's counsel in which he says that the citation was not valid because the inspector failed to make the final findings required by section 104(d), which is that there was unwarrantable failure of the operator to comply with the standard cited. As Ms. Rooney has pointed out and as the inspector said in reply to one of my questions, it is a fact that when an operator is given a citation or an order, there is a provision on the face of the citation or order which states that the operator should see the reverse side of the citation or order of withdrawal. If that is done, it will be found that the reverse side explains the provisions of section 104(a), section 104(d)(1), section 104(f), and other provisions. That is why the two words "see reverse" are placed on the front of the citation, so that an operator will be notified, when section 104(d) is entered on the front of the citation or order, if the operator looks on the back, he will find what that section involves. In this case, the explanation on the back of the citation indicates that an unwarrantable failure has been found to exist in order for the citation to be issued under section 104(d)(1) of the Act.

I wrote a decision in Pontiki Coal Corp., 2 FMSHRC 370 (1980), in which the primary issue was whether the fact that the citation or order stated on its face "see reverse" was sufficient notice to the operator that the findings required for issuing an unwarrantable failure citation had been made by the inspector. I held in that case that the fact that unwarrantable failure was explained on the back of the form was sufficient for the purpose of making the necessary findings. The Pontiki case was not appealed to the Commission, so I find in this case, consistent with

my holdings in that case, that the inspector did make the required findings as to unwarrantable failure and that his Citation No. 939522 should be affirmed.

Now, as to the other contentions by the operator in this case, it was stated that he didn't really have the opportunity to make suggestions when the ventilation plan was renewed each 6 months and that he pretty much is required to agree with whatever sort of new provisions MSHA may put in his new plan when it is sent to him for his signature. I am in sympathy with the operator on those things, both the roof control plan and the ventilation plan, in that I think an operator does pretty much find himself trying to get his views into the plan when they are pretty much dictated to him by MSHA.

But in this instance, I think that the Act itself provides a pretty specific indication that MSHA may amend these ventilation plans to provide for the continuous maintenance of the line brattice, whether work is being performed or not. Because of injuries and fatalities that have occurred on account of methane accumulation, MSHA personnel feel they must become increasingly strict in these plans. In doing so, however, they are not going beyond the original provisions of the safety standards because section 303(c)(1) of the 1969 Act provided the language which is now section 75.302 of the Regulations. That section provides that:

> Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust and explosive fumes, unless the Secretary or his authorized representative permits an exception to this requirement, where such exception will not pose a hazard to the miners.

So, I believe that MSHA was well within the original provisions of the Act when it amended the plan as originally issued to require that those line brattices be continuously maintained.

I believe that I have covered most of the arguments that have been made by the parties and the only thing that remains to be done is to consider the six criteria before assessing a penalty. The stipulations show that two of the criteria have already been stipulated to, namely, that the size of respondent's business is small, and that the operator did abate this citation of a violation within the time provided for by the inspector. In fact, the inspector gave the operator until 9:30 to abate the violation, and he wrote a termination by 9:15, which would have been only one hour after he issued it. For the men to have put up curtains in four entries in an hour's time, when you consider how much distance was involved, indicates that respondent abated the violation in a rapid manner and should have some consideration for the promptness of its action in so doing. It has also been stipulated as to another of the criteria that payment of a penalty would not cause respondent to discontinue in business.

As to the history of previous violations, it was stated that there have been eight previous violations of section 75.316 in the last 24 months. While Mr. Hurley indicated he felt I should consider some of the matters about the number of inspection days involved, it, of course, is not necessary for judges to follow the assessment formula in 30 C.F.R. § 100.3 when a case has gone to hearing and the judge is making findings of facts on the record containing testimony and exhibits presented by the parties. Since it has not been my practice to pay any attention to what the Assessment Office may have done before a case comes to hearing before me, I find that it is immaterial that the Assessment Office may have made some calculations as to the number of inspection days and that there may be a certain number of violations in the last 24 months, because it has been my consistent practice since starting this work in 1972 to make assessments under the criterion of history of previous violations entirely on whether previous violations of the section before me in a given case have occurred.

Since eight previous violations occurred in a 24-month period, I consider that to be more than I usually encounter in these cases. Consequently, I believe that whatever other penalty might be assessed in this case, a penalty of $100 should be assessed under the criterion of history of previous violations.

The only two criteria that remain to be considered are negligence and gravity. The inspector's finding of a high degree of negligence was based almost entirely on his statement that the weekend entry in the preshift book shows that these curtains had been left down from the previous Friday by the evening crew, and it was his opinion that the curtains should have been rehung during Saturday or Sunday. He felt the failure to do so, especially after it was written up by one of the examiners of the mine, indicated a high degree of negligence. There is, of course, nothing in the ventilation plan in Exhibit 3 which indicates occurrences of changes in the mining height or the width of the entries which have been mentioned in this proceeding and which have been noted in my findings of fact, supra. I recognize that the company had a problem here in trying to use the curtains at an entry which was barely wide enough for the equipment. I'm taking that into consideration as a mitigating factor in assessing the penalty; but the fact that the operator failed to install curtains on Saturday and Sunday cannot be ignored because that is what the plan requires, and the Act too, for that matter. The curtain is required to be maintained continuously and should, therefore, have been erected whether or not any production was being performed. Consequently, I find that there was a relatively high degree of negligence.

Now, we come to the final criterion of gravity. I don't think that we can say that this constituted more than a moderate amount of gravity because it is a fact that no production was going on. At the time the citation was actually written, it is a fact that methane was only .01 to .02 of 1 per cent. An inspector checked all the entries with his methane detector and could not even get a reading, so while there was a potential there for a possible injury, the fact is that at the time the inspector issued the citation there was, at most, a moderate seriousness in the violation.

In conclusion, I find that the company abated the violation in less than the time given by the inspector, that it is a small company, that the gravity of the violation was not great, and that there was a relatively high degree of negligence. In such circumstances, I find that a penalty of $300 is appropriate, to which $100 will be added under the criterion of history of previous violations, making a total penalty of $400.

After I had rendered the bench decision set forth above, I learned that the Commission had issued in Secretary of Labor (MSHA) v. Paramont Mining Corporation, Docket No. VA 81-45, on September 21, 1981, an order denying a petition for interlocutory review of an order issued on August 19, 1981, by Administrative Law Judge George A. Koutras in that proceeding. Judge Koutras' order had granted the Secretary's motion for partial summary decision as to the question of whether respondent Paramont Mining Corporation could raise the issue of the validity of an unwarrantable-failure order in a civil penalty proceeding. Inasmuch as the Commission declined to grant Paramonth's petition for interlocutory review, it may appear that I erred in considering the merits of the unwarrantable-failure citation in this civil penalty proceeding. In C.C.C.-Pompey Coal Co., Inc.,2 FMSHRC 1195 (1980), the Commission held that a judge should not issue a bench decision in final written form without considering the holdings in Commission decisions which were issued between the time the bench decision was rendered at the hearing and the time the bench decision is issued in final form.

The primary basis for my ruling in this case that respondent could obtain a review of the validity of the unwarrantable-failure citation in a civil penalty proceeding was that the Commission had considered the meaning to be assigned to the phrase "significant and substantial" in its decision in Cement Divison, National Gypsum Co., 3 FMSHRC 822 (1981), even though the proceeding in which the Commission considered that issue was a civil penalty proceeding. Upon further examination of the Commission's decision in the National Gypsum case, I have noted that all of the alleged violations in that proceeding involved citations on which the inspector had checked a "block" showing that he considered all of the alleged violations to be "significant and substantial" as that term is used in section 104(d) of the Act. The Commission considered the meaning of that phrase in order to clarify the interpretation which should be given to the words "significant and substantial" in light of some decisions issued by the former Board of Mine Operations Appeals after its decision in Zeigler Coal Co., 3 IBMA 448 (1974), was reversed in UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), because the Board had held that findings as to "significant and substantial" had to be made before unwarrantable failure orders could be issued under section 104(c) of the Federal Coal Mine Health and Safety Act of 1969. The Commission clarified the definition which should be ascribed to "significant and substantial" in a civil penalty case because the inspectors were routinely designating ordinary violations alleged in citations written under section 104(a) of the 1977 Act as being "significant and substantial". The Commission believed that such routine employment of the term "significant and substantial" might eventually be used as a basis for finding an operator to have a "pattern of violations" pursuant to the provisions of section 104(e) of the Act.

My conclusion in the bench decision, supra, to the effect that the Commission's consideration of "significant and substantial" in the National Gypsum case indicated that the Commission has not prohibited consideration of the validity of citations in civil penalty cases failed to comment on the difference between the breadth of review which is permitted of citations issued under the 1977 Act as opposed to the constraints of review which are placed on orders issued under the 1977 Act. The change in the language as to review of citations under the 1977 Act, as opposed to review of notices of violation under the 1969 Act, 2/ was discussed by the Commission in Energy Fuels Corp., 1 FMSHRC 299 (1979), in which the Commission stated (at p. 302):

> * * * On the other hand, section 105(a), when read with section 105(d), may be read to permit an operator to await the issuance of the notification of proposed assessment of penalty before deciding whether to contest the entire citation, rather than require the operator to so wait. [Emphasis in original.]

At page 309 of the Energy Fuels case, the Commission further stated:

> * * * If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. * * *

In Wolf Creek Collieries Co., Docket No. PIKE 78-70-P, issued March 26, 1979, the Commission agreed with the former Board's consistent holdings that, under the 1969 Act, a respondent could not obtain review of the validity of orders in civil penalty proceedings (Eastern Associated Coal Corp., 1 IBMA 233 (1972); Zeigler Coal Co., 1 IBMA 216 (1973); Plateau Mining Co., 2 IBMA 303 (1973); Buffalo Mining Co., 2 IBMA 327 (1973); North American Coal Corp., 3 IBMA 93 (1974); Zeigler Coal Co., 3 IBMA 366 (1974); Jewel Ridge Coal Corp., 3 IBMA 376 (1974); Peggs Run Coal Co., 5 IBMA 3 (1975); and Ashland Mining Development Co., Inc., 5 IBMA 259 (1975)). The Commission made a similar holding as to the 1969 Act in Pontiki Coal Corp., 1 FMSHRC 1476 (1979). In Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980), the Commission held that the validity of orders issued under the 1977 Act is not to be considered in civil penalty proceedings.

My review of the Commission's holdings with respect to obtaining review of the validity of citations in civil penalty proceedings, as opposed to obtaining review of the validity of orders in civil penalty cases, shows that I correctly interpreted the Commission's consideration of the term "significant and substantial" in the National Gypsum case, supra, to mean that an operator may obtain review of the validity of citations in civil penalty proceedings, but may not obtain review of the validity of orders in civil penalty proceedings. Inasmuch as the question of the validity of a citation was before me in this proceeding, I reaffirm my finding that it is permissible for an

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2/ Under the 1969 Act, review of a notice of violation was restricted to the question of whether the time set by the inspector for abatamant was unreasonable (UMWA v. Andrus, 581 F.2d 888 (D.C. Cir. 1978)).

operator to contest the validity of a citation in a civil penalty proceeding even if the operator has failed to seek review of that citation by filing a notice of contest under section 105(d) of the Act within 30 days after the citation was issued. Therefore, the fact that the Commission declined to grant an interlocutory review of Judge Koutras' decision in the Paramont Mining case in which he had held that an operator may not obtain a review of the validity of an order, as opposed to a citation, in a civil penalty proceeding, is consistent with my holding in this proceeding that an operator may obtain review of the validity of a citation, but not an order, in a civil penalty proceeding. In short, I find that it was not error for me to grant review of the validity of a citation in this proceeding and that portion of my decision which so held is confirmed.

WHEREFORE, it is ordered:

(A) Citation No. 939522 was correctly issued on January 26, 1981, under section 104(d)(1) of the Act and the citation is affirmed.

(B) Within 30 days from the date of this decision, respondent shall pay a civil penalty of $400.00 for the violation of section 75.316 alleged in Citation No. 939522.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 31 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. CENT 80-306-M
	:	A/O No. 41-00038-05007
v.	:	
	:	Docket No. CENT 80-354-M
KAISER CEMENT CORPORATION, Respondent	:	A/O No. 41-00038-05008-I
	:	
	:	Longhorn Cement Plant

DECISION

Appearances: Donald W. Hill, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Secretary of Labor, Mine Safety and Health Administration, Petitioner;
Robert E. Bettac, Esq., Foster & Associates, Inc., San Antonio, Texas, for Kaiser Cement Corporation, Respondent.

Before: Judge Stewart

These are proceedings filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereafter the Act), to assess civil penalties against Kaiser Cement Corporation (hereafter Kaiser) for violations of mandatory safety standards. 1/

1/ Sections 110(i) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

STIPULATIONS

On November 24, 1980, the parties filed stipulations of fact to constitute the entire record in these proceedings. On May 18, 1981, the parties filed supplementary stipulations including the following which pertain to the statutory criteria applicable to all citations:

Size of mining operation - medium

History of previous violations - moderate

Neligence on the part of Kaiser - none

Effect of the proposed penalties on the ability of Kaiser to continue in business - none

Kaiser demonstrated good faith in attempting to achieve rapid compliance after notification of each violation.

Docket No. CENT 80-306-M (Three Citations)

The stipulations applicable to Citation Nos. 172310, 172311, 170580, and 170681 were as follows:

1. Jurisdiction over this proceeding is conferred upon the Federal Mine Safety and Health Review Commission under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. The alleged violations of the Act took place in or involve a mine that has products which enter commerce or has operations or products which affect commerce.

2. All statements made by the Secretary's safety inspectors on the face of the Citation forms, as amended, are true. All Citation Forms attached to the Complaint Proposing Penalty are incorporated by reference, as if fully set forth herein.

3. Each of the instant citations was issued during the course of a special inspection as described at 30 C.F.R. Part 43, which inspection was initiated by a miner or representative of miners upon written notice or complaint.

4. No copy of such written notice or complaint was provided to the Respondent by the Secretary's safety inspectors on or before the date of said special inspection, notwithstanding that Respondent requested such written notice prior to the beginning of said special inspection. The Secretary's safety inspector did, however, describe the general contents of said written complaint to an authorized representative of the Respondent prior to beginning said special inspection.

5. The violation alleged in each Citation was not due to any negligence on the part of the Respondent, and the penalty points attributable to the "Negligence" factor should be "0". [2/] The preceding stipulation is based on the following, further stipulations applicable to each of the alleged violations: (1) Respondent did not contribute by act or omission to the occurrence of the alleged violation; (2) the Respondent did not contribute by act or omission to the continued existence of the alleged violation; (3) none of Respondent's employees was exposed or likely to be exposed to the unsafe conditions alleged; and (4) Respondent neither knew or should have known of the allegedly unsafe conditions.

6. The unsafe practices alleged in each Citation were committed only by employees of independent contractors performing construction work at the Respondent's mine. Each such independent contractor exercised an independent employment and contracted to do the work according to its own judgment and methods, and without being subject to the control of Respondent except as to the results of the work, and each independent contractor had the right to employ and direct the actions of their respective employees, independently of Respondent and free from any superior authority of Respondent to say how the work would be done or what the laborers would do as it progressed.

7. Employees at Respondent's mine collectively worked between three-hundred thousand and five-hundred thousand hours annually, and penalty points for mine size, if any, would be 7. Employees of the company which controls the Respondent work between nine-hundred thousand and three million hours annually, and the penalty points, if any, based on the size of the controlling company would be 3. The average number of violations assessed per year in the 24 months preceding the instant alleged violations was 10.5,

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2/ The penalty points referred to in the stipulation are from Part 100 of Title 30 Code of Federal Regulations which sets forth the criteria and procedures for the proposed assessment of civil penalties by the Assessment office. The point system is not utilized in the assessment of penalties herein. 29 C.F.R. § 2700.29 provides as follows:

"(a) In assessing a penalty the Judge shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) of the Act, 30 U.S.C. § 820(i), and incorporate such determination in a decision containing findings of fact, conclusions of law, and an order requiring that the penalty be paid.

"(b) In determining the amount of penalty neither the Judge nor the Commission shall be bound by a penalty recommended by the Secretary or by any offer of settlement made by any party."

and the penalty points, if any, for history of violations would be 1. The average number of violations assessed per inspection day in the 24 months preceding the instant alleged violations was .88, and the penalty points, if any, under the "Inspection Day" factor would be 6.

Stipulations Applicable to Citation No. 170580 3/

8. The applicable mandatory safety standard, if any, is contained at 30 C.F.R. 56.9-40(c) of the Secretary's Rules and Regulations.

9. The unsafe practice alleged herein occurred on mobile equipment owned by, and was committed by a person employed by, Jud Plumbing, Heating and Air Conditioning, an independent contractor.

10. As part of its construction contract with Jud, Respondent required Jud to keep itself fully informed and to comply with all state and federal laws affecting safety; to be responsible for accident prevention and safety in performance of the work; to take all reasonable measures to prevent injury to persons or property as a result of the performance of the contract work; to comply with all applicable safety laws, including OSHA and MSHA; to make suitable arrangements to supply first aid facilities to its employees; to guard work performed on the construction site as necessary with fences, barriers, lights, signs, etc.; to furnish all necessary protective safety equipment to its employees; to implement a safety program for its employees and to designate a coordinator of safety, security, and fire control; and to notify the Respondent of any hazardous conditions, property, or equipment at the work site that are not under Jud's control.

11. The probability, under normal circumstances, that an injury would result from a violation of the cited standard is

3/ Citation No. 170580 was issued on February 6, 1980, and described the pertinent condition or practice as follows:

"An employee of Jud Plumbing, Heating, and Air Conditioning, a subcontractor working at the long horn cement plant, was observed riding on the tongue of a gas welder (tag No.) 5568 that was hooked up to a state bed truck (tag No.) CT 7555, that was traveling over a rough road where the hazard of the employee falling off and being ran over by the welder causing serious injury."

The inspector asserted that Respondent abated the violation as follows: "The truck was shut down at once. The employee was made aware of the hazard."

The citation alleged a violation of 30 C.F.R. § 56.9-40(c) which provides that men shall not be transported on top of loaded haulage equipment.

"probable," and the penalty points, if any, to be assigned to the "Probability of Occurrence" factor is 3. The gravity of an injury resulting from violation of the cited standard may normally be expected to involve lost work days or restricted duty, and the penalty points, if any, to be assessed under the "Gravity of Injury Expected" factor should be 3. None of the Respondent's employees was exposed to the alleged hazard, and the number of penalty points to be assessed under the "Number of Persons Affected" factor should be "0".

12. Respondent demonstrated its good faith by making the Jud employees aware of the alleged hazard immediately. Accordingly, the penalty points, if any, to be assessed to Respondent under the "Demonstrated Good Faith" factor should be -5.

Stipulations Applicable to Citation No. 172310 4/

13. The applicable mandatory safety standard, if any, is contained at 30 C.F.R. § 56.16-7(a) of the Secretary's Rules and Regulations.

14. The unsafe practice alleged in this Citation involved the use of a crane owned by Phillips Crane Company, subcontractor to Aaction Building Systems, which in turn was subcontractor to Watson Building Systems, the general construction

4/ Citation No. 172310 was issued on February 6, 1980, and described the pertinent condition or practice as follows:

"I observed purlines supports being hoisted into place and no taglines to prevent the purline supports from swinging around in air, creating a hazard of knocking the connector men from the trusses on which they were setting to concrete floor 45 feet to 59 feet below."

On February 7, 1980, the citation was modified as noted on a subsequent action form as follows:

"This is to modify Citation No. 172310 condition or practice section to read as follows: I observed purline support being hoisted into place by employee of Watson Building Systems, sub-contractor of Aaction Building Systems, Inc, with no taglines attached to prevent the purline supports from swinging around in air, creating a hazard of knocking the connector men from the trusses on which they were setting, and falling to concrete floor approximately 50 feet below."

In terminating the citation on February 6, 1980, the inspector noted: "All employees were instructed, and signatures were required that taglines would be used on all material being hoisted."

The citation alleged a violation of 30 C.F.R. § 56.16-7(a) which provides that: "Taglines shall be attached to loads that may require steadying or guidance while suspended."

contractor on the site. The alleged unsafe practice was committed by employees of one or more of the aforementioned subcontractors or general contractor.

15. As part of its construction contract with Watson Building Systems, Respondent required Watson to keep itself fully informed and to comply with all state and federal laws affecting safety; to be responsible for accident prevention and safety in performance of the work; to take all reasonable measures to prevent injury to persons or property as a result of the performance of the contract work; to comply with all applicable safety laws, including OSHA and MSHA, to make suitable arrangements to supply first aid facilities to its employees; to guard work performed on the construction site as necessary with fences, barriers, lights, signs, etc.; to furnish all necessary protective safety equipment to its employees; to implement a safety program for its employees and to designate a coordinator of safety, security, and fire control; and to notify the Respondent of any hazardous conditions, property, or equipment at the work site that were not under Watson's control. At the time of the alleged violation, Watson had assigned a Safety Director to the construction site.

16. The probability that an injury would result from a violation of the cited standard is "improbable," for there is no evidence that the affected employees were not wearing appropriate safety belts and tag lines; the penalty points, if any, to be assigned to the "Probability of Occurrence: factor is "0". For the same reason, the gravity of an injury resulting from violation of the cited standard may normally be expected to involve no lost work days, and the penalty points, if any, to be assessed under the "Gravity of Injury Expected" factor should be "0". None of Respondent's employees was exposed to the alleged hazard, and the number of penalty points to be assessed under the "Number of Persons Affected" factor should be "0".

17. Respondent demonstrated its good faith by persuading the general contractor and the two subcontractors to meet with their respective employees immediately, instruct the employees in the "tag lines" requirement, and obtain the signatures of affected employees on a written statement of the rule. Accordingly, the penalty points, if any, to be assessed to Respondent under the "Demonstrated Good Faith" factor should be -5.

Stipulations Applicable to Citation No. 172311 5/

18. The applicable mandatory safety standard, if any, is contained at 30 C.F.R. § 56.16-11.

19. The unsafe practice alleged involved a crane owned and operated by Phillips Crane Company, a third-tier contractor. The alleged unsafe practice was committed by employees of Watson Building Systems and/or Aaction Building Systems and/or Phillips Crane Company.

20. Stipulation No. 15 above applies equally to this citation.

21. The probability, under normal circumstances, that an injury would result from a violation of the cited standard is "probable," and the penalty points, if any, to be assigned to the "Probability of Occurrence" factor is 3. The gravity of an injury resulting from violation of the cited standard may normally be expected to involve lost work days or restricted duty, and the penalty points, if any, to be assessed under the "Gravity of Injury Expected" factor should be 3. None of Respondent's employees was exposed to the alleged hazard, and the number of penalty points to be assessed under the "Number of Persons Affected" factor should be "0".

5/ Citation No. 172311 was issued on February 6, 1980, and described the pertinent condition or practice to be as follows:

"Pat Patton, operator of a Grove Model TMS-160 18-ton crane, for Phillip Crane Co, working for Watson Building Systems, Sub-contractor of Aaction Building Systems, Inc., stated on February 5, 1980, he did hoist men on the hoisting hook. Man cage was available at the cite for safe means of hoisting men."

This citation was modified on February 22, 1980, as follows:

"This is to modify the original Citation No. 172311 condition or practice section to read as follows: Pat Patton operator of a Grove Model TMS-160 18-ton crane for Phillip Crane Co., working for Watson Building Systems Sub-contractor of Aaction Building Systems Inc, stated on February 5, 1980, he did hoist men on the hoisting hook. Man cage was available at the cite [sic] for safe means of hoisting men. The hazard of the men slipping off the hook and falling to concrete floor and resulting in serious injuries."

In terminating the citation on February 6, 1980, the inspector noted: "Employees were instructed and * * * understood not to hoist men on the hoisting hook; employee signatures were required (to show) that they understood the rules."

The citation alleged a violation of 30 C.F.R. § 56.16-11 which provides as follows: "Mandatory. Men shall not ride on loads being moved by cranes or derricks, nor shall they ride the hoisting hooks unless such method eliminates a greater hazard."

22. Respondent demonstrated its good faith by persuading the general contractor and the two subcontractors to meet with their respective employees immediately, instruct them of the "man cage" requirement, and obtain their signatures to a written rule to this effect. Accordingly, the penalty points, if any, to be assessed to Respondent under the "Demonstrated Good Faith" factor should be -5.

SUPPLEMENTARY STIPULATIONS

Statutory Criteria Applicable to Citation No. 170580

Gravity of violation - low

Statutory Criteria Applicable to Citation No. 172310

Gravity of violation - low

Statutory Criteria Applicable to Citation No. 172311

Gravity of violation - moderate (It is understood, however, that Respondent does not hereby stipulate that the violation has been proved.)

Dismissal of Citation No. 172311

The motion for decision on the record was disapproved because of the statement that Respondent did not stipulate that Citation No. 172311 had been proved. On July 20, 1981, the parties filed the following additional stipulation by Western Union Mailgram:

Pursuant to an agreement by telephone 7-17-81 the parties do hereby propose to withdraw a stipulation and to offer an additional stipulation concerning Citation Number 172311 as follows:

The parties hereby move to withdraw the second sentence of stipulation Number 19 contained at Page 7 of the stipulated record submitted by the parties on 11-24-80 which read as follows: "The alleged unsafe practice was committed by employees of Watson Building Systems and/or Aaction Building Systems and/or Phillips Crane Company."

The parties hereby offer the following additional stipulation: On February 6, 1980 Pat Patton opepator [sic] of a Grove Model TMS-160 18 ton crane for Phillips Crane Company, subcontractor to Watson Building Systems, subcontractor to Aaction Building Systems, stated to the Secretary's inspector that he hoisted men on the hoisting hook on February 5, 1980. Alan Redeker the Respondent's plant manager was

present when the statement was made. There is no evidence that any of Respondent's employees engaged in or was exposed to the practice described by Mr. Patton.

The foregoing stipulation is made with the understanding that the Respondent preserves its objection to the non-admissibility of such statement into evidence.

The Secretary of Labor hereby rests his case as to all citations herein and the parties ask the honorable judge to enter a decision without the need for further proceedings.

The stipulation that the alleged unsafe practice was committed by employees of three named independent contractors has been withdrawn by the parties. The stipulations as amended are inadequate to prove a violation by either an independent contractor or by Respondent. Citation No. 172311 is accordingly dismissed.

Docket No. CENT 80-354-M (One Citation)

Citation No. 170681 was issued on October 11, 1979, and described the pertinent condition or practice as follows:

On October 11, 1979, about 10:15, a 8 foot 10 inch by 2 foot beam weighing about 900 pounds was being unloaded from the bed of semi-trailer by M. M. Sundt Construction Co. to be laid on the ground level storage area. As the beam was being swung about 90' degrees by the Grove truck crane, one of the shake out hooks slipped out allowing the beam to fall from about 6 and 1/2 feet on the ground on top of two supervisors checking for lay out of iron on ground level in the area. The beam pinned both men to the ground. The extent of the injuries: The Foreman received - cracked ribs and bruises, abrasions. The General Foreman received - cracked ribs, bruises, abrasions.

In terminating the citation on October 12, 1979, the inspector noted:

The M. M. Sundt Construction Co., Michael Zimmer, Project Manager, presented a safety meeting to all their employees on staying clear of suspended loads and being aware of work environment at 07:30 hr., 10-12-79.

The citation alleged a violation of 30 C.F.R. § 56.16-9 which provides that "men shall stay clear of suspended loads."

STIPULATIONS

The stipulations relating to Citation No. 170681 were as follows:

1. Jurisdiction over this proceeding is conferred upon the Federal Mine Safety and Health Review Commission under

the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. The alleged violation of the Act took place in or involves a mine that has products which enter commerce or has operations or products which affect commerce.

2. The applicable mandatory safety standard, if any, is contained at 30 C.F.R. § 56.15-9 of the Secretary's Rules and Regulations.

3. All statements made by the Secretary's safety inspector on the face of the Citation forms, as amended, are true. All Citation forms attached to the Complaint Proposing Penalty are incorporated by reference, as if fully set forth herein.

4. The unloading of said beam by Sundt employees was in performance of a construction contract between Respondent and Sundt which required Sundt to provide all necessary labor, supervision, materials, equipment, and tools required to erect certain mechanical equipment and structural steel for the 2nd Preheater Addition at the Longhorn Plant of Kaiser, at a lump sum contract price of $1,492,000.00. Sundt exercised an independent employment and contracted to do the work according to its own judment and methods, and without being subject to the control of Respondent except as to the results of the work, and Sundt had the right to employ and direct the actions of the workmen, independently of Respondent and free from any superior authority of Respondent to say how the work would be done or what the laborers would do as it progressed. At the time of said occurrence, Sundt was employing approximately 104 employees in the performance of said contract.

5. As part of said construction contract, Respondent required Sundt to keep itself fully informed and to comply with all state and federal laws affecting safety; to be responsible for accident prevention and safety in performance of the work; to take all reasonable measures to prevent injury to persons or property as a result of the performance of the contract work; to comply with all applicable safety laws, including OSHA and MSHA; to make suitable arrangements to supply first aid facilities to its employees; to guard work performed on the construction site as necessary with fences, barriers, lights, signs, etc.; to furnish all necessary protective safety equipment to its employees; to implement a safety program for its employees and to designate a coordinator of safety; security, and fire control; and to notify the Respondent of any hazardous conditions, property, or equipment at the work site not under Sundt's control. At the time of the alleged violation, Sundt had assigned a Safety Director to the construction site.

6. Respondent knew at all relevant times that Sundt distributes written safety rules to each employee at the time he or she is hired; and that these rules instruct the employee, inter alia, "Never work under a suspended load."

7. Employees at Respondent's mine collectively work between three-hundred thousand and five-hundred thousand hours annually, and penalty points for mine size, if any, would be 7. Employees of the company which controls Respondent work between nine-hundred thousand and three million hours annually, and the penalty points, if any, based on the size of the controlling company would be 3. The average number of violatons assessed per year in the 24 months preceding the instant alleged violation was 10.5, and the penalty points, if any, for history of violations would be 1. The average number of violations assessed per inspection day in the 24 months preceding the instant alleged violation was 1.05, and the penalty points, if any, under the "Inspection Day" factor would be 8.

8. The alleged violation was not due to any negligence on the part of the Respondent, and the penalty points attributable to the "Negligence" factor should be "0". The preceding stipulation is based on the following, further stipulations: (1) Respondent did not contribute by act or omission to the occurrence of the alleged violation; (2) the Respondent did not contribute by act or omission to the continued existence of the alleged violation; (3) none of Respondent's employees was exposed or likely to be exposed to the unsafe conditions alleged; and (4) Respondent neither knew nor should have known of the allegedly unsafe condition.

9. The probability, under normal circumstances, that an injury would result from a violation of the cited standard is "probable," and the penalty points, if any, to be assigned to the "Probability of Occurrence" factor is 3. The gravity of an injury resulting from violation of the cited standard may normally be expected to involve lost work days or restricted duty, and the penalty points, if any, to be assessed under the "Gravity of Injury Expected" factor should be 3. None of Respondent's employees was exposed to the alleged hazard, and the number of penalty points to be assessed under the "Number of Persons Affected" factor should be "0".

10. Respondent demonstrated its good faith by immediately persuading Sundt to meet with its employees and reaffirm Sundt's safety rule requiring employees to stand clear of suspended loads; such meeting occurred within 24 hours of the alleged violations. Accordingly, the penalty points, if any, to be assessed to Respondent under the "Demonstrated Good Faith" factor should be -5.

11. The factors or criteria upon which the Petitioner relies in proposing a discretionary penalty of $3,000.00 for the instant citation consist solely of those articulated in 30 C.F.R. § 100.4 and in the Federal Mine Safety and Health Act.

Supplementary Stipulation Docket No. CENT 80-354-M

Statutory Criteria Applicable to Violation No. 170681

Gravity of violation - moderate.

VIOLATIONS

The parties have stipulated all issues in the case with the exception of the liability of Kaiser for violation due to acts committed by the independent contractors and the sufficiency of the evidence of record to establish the violation of 30 C.F.R. § 56.16-11 alleged in Citation No. 172311 which has been dismissed.

Although the Federal Mine Safety and Health Amendments Act of 1977 (Pub. L. 965-164, 30 U.S.C. § 801 et seq.) amended the definitions of "operator" to include an "independent contractor," conditions under which the independent contractor rather than the owner-operator should be cited were not prescribed. The Act still imposes strict liability on the owner-operator for violations and Kaiser has not been relieved of its liability by contracts and understandings with the independent contractors.

The liability of the operator for violations by independent contractors has been established by the Federal Mine Safety and Health Review Commission. Secretary of Labor, Mine Safety and Health Review Commission v. Old Ben Coal Company (MSHRC Docket No. VINC 79-119, 1 MSHC 2177, affirmed by the Court of Appeals of the District of Columbia Circuit, Docket No. 79-2367, December 9, 1980), and Monterey Coal Company v. Secretary of Labor, Mine Safety and Health Administration and United Mine Workers, 1 FMSHRC 1781 (1979), appeal dismissed sub nom. Monterey Coal Company v. Federal Mine Safety and Health Review Commission, 635 F.2d 291 (4th Cir. 1980) (appeal dismissed as premature). In Old Ben, the Commission held that the Secretary of Labor retained the discretion under the Act to cite the mine owner even though the 1977 Amendments amended the definition of "operator" to include "any independent contractor performing services or construction" at a mine. In Monterey Coal, the Commission, citing Old Ben, reversed an administrative law judge's decision in which he had held the owner not liable.

The Federal Mine Safety and Health Review Commission, on August 4, 1980, issued its decision in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburgh & Midway Coal Mining Company (P&M). That case was remanded to the judge to allow Petitioner an additional opportunity to elect the parties against which it desired to proceed. In view of the Commission's decision, an order was issued affording the Secretary of Labor an opportunity determine whether to continue to prosecute the citations against Kaiser, or

the independent contractor which was claimed to have violated the standards cited, or both. On April 16, 1981, the Secretary formally complied with that order by filing a response stating that it had elected to continue to proceed against Kaiser with respect to each of the citations herein.

It is found as a matter of law that Kaiser may be held liable for violations committed by its independent contractor.

ASSESSMENTS

Citation No.	Amount
170580	$100
172310	100
172311	100
170681	100
Total	$400

ORDER

Respondent is ORDERED to pay Petitioner the sum of $400 within 30 days of the date of this order.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

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